V. KALYANASWAMY (D) BY LRS. & ANR.

v.

L. BAKTHAVATSALAM (D) BY LRS. & ORS.

(Civil Appeal Nos.1021-1026 of 2013)

JULY 17, 2020

[SANJAY KISHAN KAUL AND K. M. JOSEPH, JJ.]

Hindu Succession Act, 1956 – Death before enactment of – Effect of – One 'RVN' had two sons ('LN' and 'RN') and five daughters – 'LN' had four sons – 'RN' was married to 'RK', they did not have any issue – 'RN' passed away on 01.06.1955 – Litigation ensued between the parties (in five stages) inter alia *through various suits – Present appeals arise out of two civil suits (fifth stage/the present litigation), one filed by 'LN's' branch (respondents) and the other by one of the four legatees (appellants-nephews of 'LN' and 'RN') under a Will (dtd.10.05.55) allegedly executed by 'RN' – Appellants claimed severance of the Joint Hindu Family alleging oral partition between 'RN' and 'LN' in 1932 – Aforesaid Will was alleged to have been executed by 'RN' appointing 'RK's' nephew as executor – Divided status was declared by way of notice allegedly dated.10.05.1955 in a newspaper, on which reply dated.11.05.1955 was sent by 'LN' – Respondents denied appellants' case – Trial court decreed respondents' suit – First Appellate Court allowed the appeals filed by the appellants – High Court* inter alia *found that the Will could not be relied upon, as the requirement u/s.68, 1872 Act was not fulfilled and restored the decree of trial court – Held: s.69, 1872 Act manifests a departure from the requirement embodied in s.68 – In the present case, requirement of proof of Will u/s.69 are fulfilled – Respondents failed to prove that the Will is vitiated – Will was indeed executed by 'RN' and was his last will – However, the notice is dated.12.05.1955 in which case the reply being sent on 11.05.1955, becomes impossible – If there is no reply sent on 11.05.1955, then, it will not be possible to attribute communication of the notice to separate to 'LN' – Thus, though there was a publication made, knowledge of the same cannot be attributed to 'LN', before the death of his brother – Therefore, since there was no division brought about by 'RN' before his death, the Will would be invalid and end of the road for appellants – Further,*

A *'RN' died on 01.06.1955, i.e. before the enactment of 1956 Act – Thus, when he died, he left behind an interest in the Hindu joint family – When succession opened to his estate, s.3(2), 1937 Act would apply – A limited estate sprung in favour of his widow, 'RK' which bloomed u/s.14 (1), 1925 Act into an absolute estate – When she compromised in O.S No.71 of 1958 giving up her rights over the property including the plaint scheduled property in these cases, it conferred absolute rights in favour of 'LN's' branch – Code of Civil Procedure, 1908 – Or.II, r.2 – – Transfer of Property Act, 1882 – s.19 – Evidence Act, 1872 – ss.3, 33, 40-43, 68, 69, 71 – Hindu Women's Right to Property Act, 1937 – ss.2, 3, 5 – Code of Criminal Procedure, 1898 – s.145 – Estoppel/Waiver/Acquiescence – Indian Succession Act, 1925 – ss.57, 59, 63, 119, 211 – Hindu Succession (Amendment) Act, 2005 – s.6 – Doctrine of Relating Back – Doctrine of Survivorship – Hindu Wills Act, 1870 – Indian Succession Act, 1865 – Probate and Administration Act, 1881.*

D *Code of Civil Procedure, 1908 – Or.II, r.2 – Scope of – Discussed.*

Code of Civil Procedure, 1908 – Or.II, rr.2, 3 – Held: Be it the omission or intentional relinquishment of a claim arising out of a cause of action under Or. II, r.2(2) or not seeking a relief under Or. II, r.2(3), the fatal consequences they pose, will arise only if the cause of action is the same.

Transfer of Property Act, 1882 – s.19 – Commonality between s.19 and s.119, 1925 Act – Discussed – Indian Succession Act, 1925 – s.119.

F *Evidence Act, 1872 – s.33 – Applicability of – Held: Applicability of s.33 does not depend upon the nature of the decision which is rendered in the earlier proceeding.*

Evidence Act, 1872 – s.33 – Held: Requirements u/s.33 are not to be confused with the ingredients to be fulfilled even in a case u/s.11, CPC – Code of Civil Procedure, 1908 – s.11.

Evidence Act, 1872 – First proviso to s.33 – 'representative in interest' – Interpretation of – Held: 'representative in interest', is to be understood liberally and not confined to cases where there is privity of estate and succession of title.

H

Evidence Act, 1872 – s.68 vis-à-vis *s.69 – Held: s.69 manifests a departure from the requirement embodied in s.68 – In a case covered u/s.69, the requirement pertinent to s.68 that the attestation by both the witnesses is to be proved by examining at least one attesting witness, is dispensed with.* A

Evidence Act, 1872 – s.69 – Evidence conforming to the requirements under – Duty of Court – Held: In a case, where there is evidence appearing to conform to the requirement u/s.69, the Court is not relieved of its burden to apply its mind to the evidence and find whether the requirements of s.69 are proved – Reliability of the evidence or the credibility of the witnesses is a matter for the Court to still ponder over. B C

Hindu Law – Will – Capacity to make – Held: Requirement of sound disposing capacity is not to be confused with physical well-being – A person who is having a physical ailment may not therefore be robbed of his sound disposing capacity – The fact that a person is afflicted with a physical illness or that he is in excruciating pain will not deprive him of his capacity to make a will. D

Hindu Law – Will – Burden to prove – Held: Burden to prove the Will and to satisfy the conscience of the court that there are no suspicious circumstances or if there are any to explain them is on the propounder of the Will – Burden to prove that the Will is procured by coercion, undue influence or fraud is on the one alleging the same. E

Hindu Law – Joint Hindu Family – Partition – Meaning of and its implications – Discussed – Hindu Succession Act, 1956 – ss.6 and 30. F

Hindu Law – Property of the joint family – Right of the coparcener – Held:In the case of property of the joint family as long as the property is joint, the right of the coparcener can be described as an interest – As long as the family remains joint, a coparcener or even a person who is entitled to share when there is a partition cannot predicate or describe his right in terms of his share – The share remains shrouded and emerges only with division in title or status in the joint family – Once there is a division the share of a coparcener is laid bare. G

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A *Hindu Law – Right of a Hindu to make a Will, before and after 1956 Act – Discussed – Hindu Succession Act, 1956 – s.30.*

Hindu Women's Right to Property Act, 1937 – s.3 – Application of – Held: s.3 of the 1937 Act applies when a Hindu dies intestate.

B *Hindu Women's Right to Property Act, 1937 – Contrast between ss.3(1) & (2)– Discussed.*

Hindu Succession Act, 1956 – Explanation to s.30 – Held: Under Explanation to s.30, it is open to a Hindu to even bequeath his interest in the Hindu Joint Family property.

C *Hindu Women's Right to Property Act, 1937 – Effect of demand for partition by a widow, on coparcener's claim based on doctrine of survivorship – Held: With the passing of the 1937 Act, in areas to which it applied, an intrusion was indeed made upon a coparceners right to set-up a claim to the property of a deceased coparcener based on the Doctrine of Survivorship but the Act did* D *not annihilate the said right – Right to claim by Survivorship came to be suspended but not extinguished – Widow, though not a coparcener, was like a coparcener in most respects – She was also conferred with the right to claim partition – Doctrine of Survivorship.*

Practice & Procedure – Principle of no evidence, if no E *pleading – When not applicable – Discussed.*

Evidence Act, 1872 – ss.40-42 – When not applicable – Discussed.

Hindu Law – Joint Hindu Family – Separation from – Notice F *to other coparceners – When complete – Held: Notice in a newspaper serves as a notice by a coparcener to effect division – However, merely causing a notice to be published, without there being evidence to show that the intended recipient became aware of it, may not suffice – There cannot be a presumption that a person has read a particular newspaper, and even more importantly, that he has read* G *the notice.*

Hindu Succession Act, 1956 –s.14(1), (2) – Applicability of – Discussed.

Words & Expressions– 'Interest', of a coparcener in a joint Hindu family property – Meaning of – Discussed.

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Dismissing the appeals, the Court A

HELD: 1. THE PROPERTY AT STAKE

The property in dispute, in both the Suits (O.S. No. 89 of 1983 and O.S. No. 649 of 1985- fifth stage/the present litigation, which generated the present appeals), is the same. In the Will dated 10.05.1955, there were sixteen items. In O.S. No. 71 of 1958 (second stage of litigation), R. Krishnammal was conferred with absolute rights in respect of seven items. The property involved in O.S. No. 36 of 1963 (third stage of litigation) also related to the seven items, which figured in compromise Decree in O.S. No. 71 of 1958, wherein R. Krishnammal was conferred absolute rights. O.S. No. 632 of 1981 (fourth stage of litigation) relates to items Nos. 5 and 6, in O.S. No. 36 of 1963. The items which are scheduled in the present Suits are the items covered by the Will dated 10.05.1955 other than the seven items, out of which, four were alienated and one was acquired. As far as O.S. No. 71 of 1958, filed by R. Krishnammal, is concerned, since she had an alternate relief claiming partition, it encompassed the entire property belonging to the coparcenary consisting of 93 items. [Para 44][693-B-D] B C D

2.1 THE EFFECT OF ORDER II RULE 2 OF THE CPC E

The contention raised by the respondents is, *inter alia*, that O.S. No. 89 of 1983 is barred by Order II Rule 2 of The Code of Civil Procedure, 1908. This is for the reason that when two out of the four appellants have instituted O.S. No. 36 of 1963, they scheduled only seven items in the said Suit. It was open to the appellants to claim the relief which they have claimed in the present Suit. Having not sued in respect of the items of properties other than the items scheduled in O.S. No. 71 of 1958, they are barred under Order II Rule 2 of the CPC. Order II Rule 2 (2) of the CPC postulates a situation where a plaintiff omits to sue in respect of any portion of his claim or intentionally relinquishes any portion of his claim. Then, he is debarred from suing in respect of the portion so omitted or relinquished. A plaintiff entitled to more than one relief arising from the same cause of action, can do two things. He may sue in respect of all the reliefs arising from the same cause of action in the same suit. He may, if he omits to sue for one or more of the reliefs open to him under the F G H

same cause of action, seek leave of the court to sue for all such reliefs, and if the court grants such leave, then, he may institute a suit, though based on the same cause of action in the earlier suit, in a fresh suit. The effect of not seeking the leave of the court, however, in regard to any of the reliefs, which it was open to him to sue for on the same cause of action, is that, he is barred from suing for any other reliefs so omitted. The difference between Order II Rule 2(2) and Order II Rule 2(3) of the CPC may be noticed. The law contemplates a distinction between a case where a claim arising out of the cause of action is either intentionally relinquished or omitted to be sued upon. Such a claim cannot be the subject matter of a fresh suit. However, when more than one reliefs are available stemming from the same cause of action, then, seeking further reliefs than sought in the first suit, except where leave is obtained, would be barred. However, present the grant of leave by the court, his subsequent suit seeking the reliefs which were originally not sought but for which leave is granted, is permissible. The principle of this provision is actually captured in Order II Rule 2 (1) of the CPC which is that every suit is to include the whole of the claim which arises out of the cause of action and which the plaintiff is entitled to make. It further declares that it is open to a plaintiff to omit any portion of the claim. However, the consequences of the same are declared in Order II Rule 2 (2) of the CPC. In this case, it is true that when O.S. No. 36 of 1963 was instituted, the earlier Suit brought by R. Krishnammal, viz., O.S. No. 71 of 1958, had culminated in a compromise Decree. A perusal of the plaint itself would show that the plaintiffs in O.S. No. 36 of 1963 have adverted to the compromise in O.S. No. 71 of 1958. They have averred in paragraph 7 of the plaint that under the compromise, R. Krishnammal was given the property scheduled in the said Suit (Suit No. O.S. No. 36 of 1963) in lieu of the properties comprised in the Will and some cash. The rest of the properties comprised in the Will were given-up by her in favour of the respondents (the sons of Lakshmiah Naidu) it is averred. Thereafter, it is averred that the defendants claim, i.e., R. Krishnammal claimed absolute title to the properties scheduled in the plaint and which was unsustainable both in law and facts. O.S. No. 36 of 1963 was filed seeking a declaration that R. Krishnammal had only a life

estate without any powers of alienation and the appellants have a vested remainder in the said properties under the Will. The word 'said' obviously refers to the items scheduled in OS No.36 of 1963. The Suit (O.S. No. 89 of 1983) is fundamentally premised on the death of R. Krishnammal in 1977 and the blossoming of the full rights of the appellants under the Will. R. Krishnammal having a life estate under the Will was alive when O.S. No. 36 of 1963 was filed. The absolute right under the Will, in favour of the appellants, dawned only with the death of the life estate holder. [Paras 46-50][693-E-G; 694-C-H; 695-A, H; 696-A-C, H; 697-A-B]

Virgo Industries (Eng.) (P) Ltd. v. Venturetech Solutions (P) Ltd. **(2013) 1 SCC 625 : [2012] 7 SCR 933 – relied on.**

2.2 Section 119 of the Indian Succession Act, 1925 deals with the date of vesting of legacy when, *inter alia*, possession is postponed. Section 19 of the Transfer of Property Act, 1882 deals with vested interest. Vested interest is different from the contingent interest. The two have vastly different consequences. The death of R. Krishnammal being a certain event, the interest of the remaindermen is a vested interest. The commonality between Section 19 of the TP Act and Section 119 of the Indian Succession Act, and which is apposite to the facts of this case, is as follows:

> **When under the Will, a life estate was created in favour of R. Krishnammal with an absolute remainder in favour of the appellants, the legacy in favour of the appellants became vested from the time of death of the testator. The possession and the enjoyment of the property, however, under the Will, was the domain of the life estate holder, *viz*., R. Krishnammal as long as she was alive. She, however, had no right to enlarge the boundaries of her right under the Will. This is, no doubt, subject to the impact of supervening Legislation. By her unilateral act or by even joining together with the third party, it would not be open to life estate holder to defeat the rights of the remainder men. The significance of a case being covered under Section 119 Illustration (III), of the Indian Succession Act, is that with the death of the Testator, the right in the property**

becomes vested with the remainder men, from the time of death of the Testator. In other words, upon the death of the legatee under the Will, in whom the absolute right is vested after the transient possession and enjoyment of the life estate holder, a heritable right, which, in fact, arose at the time of the death of the testator, would confer legal rights upon the heirs of the absolute owner under the Will when succession to his estate opens, should he not wish to leave a Will behind. Though the right is vested in the property, the enjoyment of the property with the absoluteness of a full owner under the Will could be done by the appellants only after the death of R. Krishnammal. Having thrown light upon the words 'absolute rights' in the context of Section 119 of the Indian Succession Act, 1925, it is this right which was sought to be made subject matter of a Decree for declaration and partition. It is clear that in the year 1963 or till the death of R. Krishnammal, the rights as sought to be enforced, did not inhere with the appellants as explained. They could not have sought a partition of the plaint scheduled properties while R. Krishnammal was alive. [Paras 50-52][697-C; 698-A; E-H; 699-A-C]

2.3 Be it the omission or intentional relinquishment of a claim arising out of a cause of action under Order II Rule 2(2) or not seeking a relief under Order II Rule 2 (3), the fatal consequences they pose, will arise only if the cause of action is the same. Though the plaintiffs in O.S. No. 36 of 1963 could have sought a declaration about the compromise Decree in O.S. No. 71 of 1958, *qua* all the properties covered under the Will, in the facts of this case, the cause of Action in O.S. No. 36 of 1963 and the present Suit (O.S. No. 1989 of 1983) are clearly distinct. It is significant to note that the cause of action in OS No.36 of 1963 was the threat of alienation of the items scheduled therein. O.S. No. 36 of 1963 was more as a protective action by persons who had vested interest in the property under Section 119 of the Indian Succession Act, 1925. Cause of action is not to be confused with the relief which is sought. It has more to do with the basis for the relief which is sought. [Para 54][699-F-H; 700-A-B]

3.1 THE IMPACT OF THE PROCCEDINGS AND THE DECREE PASSED IN O.S. NO. 71 OF 1958 AND O.S. NO. 36 OF 1963 AND O.S NO. 732 OF 1981

ESTOPPEL, WAIVER, ACQUIESCENCE

O.S. No. 71 of 1958 was a Suit filed by R. Krishnammal. Defendants Nos. 1 to 4 were sons of Lakshmiah Naidu. The Fifth Defendant was the Executor of the Will. R. Krishnammal lay store by the Will executed by her late husband V. Rangaswami Naidu. In the alternate, she also claimed a Decree for Partition, virtually giving-up her right under the Will and on the basis that V. Rangaswami Naidu died *intestate*. The matter did not go to trial. It ended in a compromise. The substance of the compromise is, a few of the items mentioned in the Will, seven items were recognised as absolute properties of R. Krishnammal even though, under the Will, she had only a limited right over those items. R. Krishnammal, for her part, under the compromise Decree gave-up her rights in respect of the rest of the properties. The appellants were not parties to the compromise. Appellants were not tracing their rights under R. Krishnammal. Appellants were given an absolute right under the Will executed by their uncle V. Rangaswami Naidu. The bequest in their favour created a vested interest within the meaning of Section 119 of the Indian Succession Act, 1925. R. Krishnammal could not have also enlarged the rights of the branch of Lakshmiah Naidu, once she accepted the Will, for she had only a life estate over the properties covered under the Will. The appellants were also not bound by her acts in entering into a compromise seeking to confer absolute rights *qua* those properties, which were subject matter of the Will, in respect of which, they had the right to be enjoyed after the death of R. Krishnammal. O.S. No. 36 of 1963 came to be filed by two of the four appellants, who are Legatees under the Will. They sought a declaration to the effect that R. Krishnammal could not enlarge her right and she could not alienate the properties (the very seven items, which, under the compromise Decree of O.S. NO. 71 of 1958, were recognised as her absolute properties). It is true that the plaintiffs in O.S. No. 36 of 1963 did not choose to include the plaint schedule properties in the present Suit and seek a declaration *qua* them. There are two aspects to

it, which this Court must bear in mind. Firstly, the cause of action for filing O.S. No. 36 of 1963 was alleged to be the apprehension that R. Krishnammal was about to alienate the seven items over which she acquired absolute rights under O.S. No. 71 of 1958 (in fact, it was alleged that one item was alienated). Secondly, paragraph-11 of the Plaint has already been noticed. Therein, the plaintiffs have revealed their mind to be that they intend to pursue their right *qua* other properties apparently which are the plaint schedule properties in O.S. No. 89 of 1983. As already indicated, the bar of Order II Rule 2 of the CPC will not apply. There is some merit in the contention of the appellants that the Decree passed in O.S. No. 36 of 1963 did involve watering down the terms of the compromise Decree in O.S. No. 71 of 1958. As on the date of the compromise in O.S. No. 36 of 1963, the position was that four, out of the seven items, had been alienated by R. Krishnammal, whereas, one property had been acquired by the Government. As regards Item Nos. 5 and 6 in the plaint schedule in O.S. No. 36 of 1963, the terms of the Will dated 10.05.1955, came to be reiterated. This is for the reason that in departure from the terms of the Decree in O.S. No. 71 of 1958, under which R. Krishnammal was conferred with the absolute rights in respect of Item Nos. 5 and 6, in regard to the very same items, under the compromise Decree in O.S. No. 36 of 1963, R. Krishnammal was only to enjoy the properties during her lifetime and without the power of alienation. In other words, the terms of the Will dated 10.05.1955 are seen reflected and reinforced by the compromise Decree in O.S. No. 36 of 1963. Both, in O.S. No. 71 of 1958 and O.S. No. 36 of 1963, there is no adjudication by the court. As to what is the expediency which led the parties to enter into the compromise Decree, may not be decisive of the legal rights of the parties which this Court is called upon to pronounce. The action of the branch of Lakshmiah Naidu, who had also joined as parties in O.S. No. 36 of 1963, and who were represented by the Counsel, may not obviate the need for proving the Will on the part of the appellants. [Paras 55, 56][700-D-G; 701-A-H; 702-A-C]

3.2 In the compromise Decree in O.S. No. 36 of 1963, the plaintiffs have stated that they are not seeking any relief against the other defendants which include the Lakshmiah branch. From

this, it is sought to be contended that the interest of the branch of Lakshmiah Naidu, which stood secured under the compromise Decree of O.S. No. 71 of 1958, whereunder R. Krishnammal had given up her rights in regard to all properties other than the seven items over which she was conferred absolute rights, was left undisturbed and unimpeached. This conduct is emphasised to point out that it would constitute a bar by way of principles, including estoppel and acquiescence for the appellants in instituting O.S. No. 89 of 1983 in regard to the plaint schedule properties over which R. Krishnammal had give-up all her rights in O.S. No. 71 of 1958. Even in the Plaint, in O.S. No. 36 of 1963, the properties, other than the seven items, were admittedly not the subject matter of the Suit. More importantly, what is stated in the compromise is that no relief is claimed against the other Defendants in the said Suit. It is equally true that by the passing of the Decree in O.S. No. 36 of 1963, the interest of the Lakshmiah branch was not imperilled. This is for the reason that in regard to Item Nos. 5 and 6 in O.S. No. 36 of 1963, over which the rights of R. Krishnammal were limited to a life estate with a taboo against alienation bringing it in tune with the terms of the Will under the Compromise did not matter for the branch of Lakshmiah Naidu. This is for the reason that as far as they were concerned, they were already bound by the compromise Decree in O.S. No. 71 of 1958 whereunder R. Krishnammal had been conferred absolute rights in regard to Item nos. 5 and 6, *interalia*, and they had lost all their rights. Therefore, the arrangement *inter se* between the appellants and R. Krishnammal, *qua* those properties, was of no concern to them. What they were interested in was the rest of the properties over which they were given absolute rights under the compromise Decree in O.S. No. 71 of 1958. The result is that on the one hand the terms of the Will came to be reiterated under the compromise Decree in O.S. No. 36 of 1963 *qua* Item Nos. 5 and 6. The Decree in O.S. No. 71 of 1958 was otherwise left untouched. The passing of a Decree in O.S. No. 36 of 1963, is a matter which is entirely between the appellants and R. Krishnammal. In fact, the Lakshmiah Naidu branch, though made parties to the compromise, were not actually parties to the Decree. They have not signed as parties to the compromise Decree. Therefore, neither the appellants nor the respondents

can derive any advantage from either the filing of O.S. No. 36 of 1963 or the passing of the compromise Decree therein. The plaintiffs in O.S. No. 36 of 1963 have also filed O.S. No. 732 of 1981. The Lakshmiah branch (among the respondents in the appeals) were not parties. It was a Suit for partition of items 5 and 6 scheduled to O.S. No. 36 of 1963. It is obvious that they cannot rely upon principles of *res judicata* or constructive *res judicata* based on O.S. No.732 of 1981, being not parties to the said Suit. What, however, is sought to be urged, is that the premise, on the basis of which the Decree in O.S. No. 732 of 1981 was passed, is completely incongruous with the cause of action in the present Suit. In other words, it is pointed out that in O.S. No. 732 of 1981, the case set-up was R. Krishnammal had rights over the property and this was inconsistent with the case set-up in the present Suit. It was contended that the appellants were estopped from undertaking such a course of action. The following conduct could also be deduced. The cause of action in O.S. No. 732 of 1981 did involve drawing upon the rights secured (*qua* Item Nos. 5 and 6 in O.S. No. 36 of 1963) in O.S. No. 71 of 1958 whereunder the Lakshmiah branch acknowledged rights of R. Krishnammal who also gave-up her rights to properties which included the plaint schedule items in the case. Though, this Court is not oblivious to the dimensions projected, it would not think that Right to Property, if otherwise is established in favour of the appellants, it would be lost. It cannot be treated as a case of abandonment of rights *qua* the plaint schedule properties. The respondents who were not parties to O.S. No. 732 of 1981, cannot set-up a case of estoppel. [Paras 57][702-D-H; 703-A-H; 704-A]

Sha Mulchand & Co. Ltd. (In Liquidation), By Official Receiver, High Court, Madras v. Jawahar Mills Limited Salem **AIR 1953 SC 98 : [1953] SCR 351;** *Dr. Karan Singh v. State of J&K and Another* **(2004) 5 SCC 698 : [2004] 1 Suppl. SCR 43 – relied on.**

4.1 <u>WHETHER THE WILL DATED 10.05.1955 HAS BEEN PROVED</u>

[Sections 33, 68 and 69 of the Evidence Act]

The Will in question is an unprivileged Will. The mode of making an unprivileged Will is provided in Section 63 of the Indian

Succession Act. In order that a valid Will be made not only, it is necessary that the Testator must execute the document but also the execution must be attested by at least two witnesses. What is required is not ordinary witnessing of a document but attestation which is as is provided in Section 63 of the Indian Succession Act. Section 68 of the Indian Evidence Act, 1872 deals with proof of execution of a document required by the law to be attested. A perusal of the same makes it clear that in the case of a Will, being a document which is required to be attested by Section 63 of the Indian Succession Act, if there is an attesting witness alive and subject to the process of the court and capable of giving evidence, then, the Will can be proved only if one of the attesting witness is called for proving its execution. Though the expression used in Section 69 of the Indian Evidence Act, 1872 is 'if no such attesting witness can be found, *inter alia*, it bears the following interpretation'. The word 'such' before 'attesting witness' is intended to refer to the attesting witness mentioned in Section 68 of the Evidence Act. As far as the expression 'found' is concerned, it would cover a wide variety of circumstances. It would cover a case of an incapacity to tender evidence on account of any physical illness. It would certainly embrace a situation where the attesting witnesses are dead. Should the attesting witness be insane, the word "found" is capable of comprehending such a situation as one where the attesting witness, though physically available, is incapable of performing the task of proving the attestation under Section 68 the Evidence Act, and therefore, it becomes a situation where he is not found. In this case, there is no dispute that both the attesting witnessing were not alive at the relevant time. [Paras 58, 59, 61 and 64][704-B-D, E, G; 705-A-B; 706-C]

4.2 The contention of the respondents appears to be only that, in the proceeding under Section 145 of the CrPC, 1898 (first stage of litigation), the tussle was between R. Krishnammal and the Executor of the Will who were styled as A Party Nos. 1 and 2 and the B Party, viz., the respondents. The present appellants were not parties. Therefore, the proceeding was not between the same. The other limb of the first *proviso* to Section 33, viz., that in order that Section 33 of the Evidence Act applies, the proceeding is between their representatives in interest is not

fulfilled. The contention seen raised is that the appellants, who are the remainder men under the Will, cannot be treated as representatives in interest of R. Krishnammal. Further the nature of Section 145 proceedings is highlighted as not one attracting the 3rd proviso. The word 'representative in interest', in other words, is to be understood liberally and not confined to cases where there is privity of estate and succession of title. Answering the two tests, which have been evolved in the facts of this case, the respondents cannot contend that the interest of the appellants was inconsistent with the interest of R. Krishnammal and in particular the executor of the Will. It was certainly not antagonistic to their interest. The Will was indeed set-up by R. Krishnammal and the executor. Therefore, it can be safely concluded that the interest of both persons comprised of A Party, which was the protection of the possession, was also in the interest of the appellants. It may be true that the appellants do not derive their title under R. Krishnammal. But the requirements under Section 33 of the Evidence Act are not to be confused with the ingredients to be fulfilled even in a case under Section 11 of the CPC. It cannot be contended that the interest of the appellants lay in answering the question posed in Section 145 of the CrPC proceedings against R. Krishnammal and the Executor in favour of the respondents, who were parties before the Magistrate. The case of the Will was explicitly set up as also the declaration dated 10.5.1955 and further developments. Therefore, the contention based on the third proviso also does not appeal. Also not only was there opportunity to cross examine to the B party, it was availed of. The applicability of Section 33 of the Evidence Act also does not depend upon the nature of the decision which is rendered in the earlier proceeding. On this basis, as Exhibit-B7 (deposition of the one of the attesting witnesses in the Will, in proceedings under Section 145 of the CrPC) and even B13 (deposition by the Executor) indeed is evidence which was tendered in the previous proceeding before the Magistrate who was certainly authorised by law to take evidence, which is relevant for proving the truth of the facts contained therein under Section 33. [Paras 66-68][707-D-F; 708-G-H; 709-A-E]

4.3 Section 69 of the Evidence Act manifests a departure from the requirement embodied in Section 68 of the Evidence

Act. In the case of a Will, which is required to be executed in the mode provided in Section 63 of the Indian Succession Act, when there is an attesting witness available, the Will is to be proved by examining him. He must not only prove that the attestation was done by him but he must also prove the attestation by the other attesting witness. This is, no doubt, subject to the situation which is contemplated in Section 71 of the Evidence Act which allows other evidence to be adduced in proof of the Will among other documents where the attesting witness denies or does not recollect the execution of the Will or the other document. In other words, the fate of the transferee or a legatee under a document, which is required by law to be attested, is not placed at the mercy of the attesting witness and the law enables proof to be effected of the document despite denial of the execution of the document by the attesting witness. The requirement in Section 69 of the Evidence Act would be if the signature of the person executing the document is proved to be in his handwriting, then attestation of one attesting witness is to be proved to be in his handwriting. In other words, in a case covered under Section 69 of the Evidence Act, the requirement pertinent to Section 68 of the Evidence Act that the attestation by both the witnesses is to be proved by examining at least one attesting witness, is dispensed with. It may be that the proof given by the attesting witness, within the meaning of Section 69 of the Evidence Act, may contain evidence relating to the attestation by the other attesting witness but that is not the same thing as stating it to be the legal requirement under the Section to be that attestation by both the witnesses is to be proved in a case covered by Section 69 of the Evidence Act. In short, in a case covered under Section 69 of the Evidence Act, what is to be proved as far as the attesting witness is concerned, is, that the attestation of one of the attesting witness is in his handwriting. The language of the Section is clear and unambiguous. Section 68 of the Evidence Act, as interpreted by this Court, contemplates attestation of both attesting witnesses to be proved. But that is not the requirement in Section 69 of the Evidence Act. [Paras 70, 71][710-C-H; 711-A]

4.4 Section 69 speaks about proving the Will in the manner provided therein. The word 'proved' is defined in the Evidence

Act in Section 3. The question would be whether having regard to the evidence before it, the Court can believe the fact as projected in the evidence as proved. In a case, where there is evidence which appears to conform to the requirement under Section 69, the Court is not relieved of its burden to apply its mind to the evidence and find whether the requirements of Section 69 are proved. In other words, the reliability of the evidence or the credibility of the witnesses is a matter for the Court to still ponder over. As far as this case is concerned, the evidence of one of the attesting witnesses is contained in B7 and which is found relevant under Section 33, establishes that he was an Income Tax Practitioner. He was beckoned by Rangaswami Naidu, informing him that he had written a Will and it was to be attested. He was asked to in fact to attest even upon going there on that day. He speaks about the testator signing on every page and also, he has spoken about him signing. He establishes requirement of Section 69 in regard to the signature of one of the attesting witnesses being proved in his handwriting. There is no reason to doubt the testimony. As far as signature of the testator is concerned, apart from B7 and B13, the executor has spoken of the testator signing. Also, PW1 (the witness on behalf of the respondent) has deposed that the Will was shown to him he admitted that every page is contained with the paternal uncle signature. Thus, the requirement of proof of Will under Section 69 are fulfilled. [Paras 73, 74][712-B-H]

5. <u>WHETHER RECEPTION OF B10 (CERTIFIED COPY OF THE WILL) AS SECONDARY EVIDENCE LEGAL?</u>

The original of the Will according to the case of the appellants continued to be with the executor who was in fact the nephew of R. Krishnammal, the widow of Rangaswami Naidu. An attempt was made to get the original Will produced at the relevant time when the executor had passed away, on the basis that his son was in possession of the original Will. He was called upon to produce the Will by C1. He responded by pointing out that he was not having the original Will with him. The finding of the Trial court as affirmed by the First Appellate Court is that circumstances warranted admission of secondary evidence to prove the Will. There is no reason to take a different view and

the view taken by the High Court cannot be sustained. It may be true that in the proceedings in O.S. No. 71 of 1958 and O.S. No. 36 of 1963, the Will was projected first by R. Krishnammal and thereafter, the plantiffs in O.S. No. 36 of 1963 who are among the appellants before this Court. However, the matter did not go to trial. The Will must be proved under the Evidence Act and not with reference to plea of estoppel as taken by the appellants based on the decree in O.S. No. 36 of 1963, being based on the Will and the respondents having participated not as parties even to the compromise but it is a far cry from finding that the facts of the case did not warrant admission of secondary evidence regarding the Will. [Paras 76, 77][713-C-G]

6. <u>THE WILL: WHETHER IT IS THE GENUINE WILL OF RANGASWAMI NAIDU? WHETHER IT IS VITIATED ON ANY GROUND?</u>

Rangaswami Naidu was an educated man. He was a former M.L.C. He was an affluent man. He has no issues. He was affectionate towards his sisters. He has chosen to favour each branch of his sisters by selecting one son out of each branch to be the legatees in whom the property were to vest. In fact, he has also provided that the properties are to remain in the family and should any of the legatees wish to sell, it should be offered to the other legatees. As far as his health is concerned, it is well settled that the requirement of sound disposing capacity is not to be confused with physical well-being. A person who is having a physical ailment may not therefore be robbed of his sound disposing capacity. The fact that a person is afflicted with a physical illness or that he is in excruciating pain will not deprive him of his capacity to make a will. What is important is whether he is conscious of what he is doing and the will reflects what he has chosen to decide. While it may be true that he was suffering from cancer of the throat there is nothing to indicate in the evidence that he was incapable of making up of his own mind in the matter in leaving a will behind. The fact that he was being fed by a tube could hardly have deprived him of his capacity to make a will. The will is a registered will. The Registrar came home. Exhibit X1 would show that Rangaswami Naidu on being asked to put his thumb impression, he insisted on signing. This course of conduct

has been correctly appreciated by the first appellate court, the final court on facts. The inference to the contrary sought to be drawn does not appeal. From the evidence, it is also clear that the other attesting witness was Dr. C.S. Ramaswamy Iyer a fairly renowned Physician and family friend. PW1, the witness on behalf of the respondent has himself admitted publishing the obituary on the passing away of the said doctor. PW1 speaks about him as a gentleman and he won't act illegal manner. In B7 the other attesting witness has also spoken about the doctor remaining there and no doubt leaving before the Registrar came. It has already been held that the requirement of Section 69 of the Evidence Act stands fulfilled otherwise. The fact that no bequest is made in favour of the sons of Lakshmiah Naidu cannot be treated as a suspicious circumstance. It is clear that Lakshmiah Naidu was extremely wealthy. Making the nephew of his wife executor of the will, in fact, does assure of the absence of any foul play on the part of the legatees. In his evidence [B13 which is the evidence given by the Executor in 145 proceedings], he has spoken about the testator expressing his desire on 2-3 occasions about wanting to executing a will. From the evidence adduced by PW1 also, the view taken by the first appellate court regarding the will cannot be characterized as a perverse one warranting interference in the second appeal. Lastly, while the burden to prove the will and to satisfy the conscience of the court that there are no suspicious circumstances or if there are any to explain them is on the propounder of the will, the burden to prove that the will is procured by coercion, undue influence or fraud is on the respondents who have alleged the same. The evidence of PW1 would show that the respondents have failed to prove that the will is vitiated in this regard. Therefore, the will was indeed executed by R. Naidu and was his last will. The case of the appellants is based, in fact, on their having been an oral partition between the two brothers in the year 1932. Three Courts have found no merit in this contention. In fact, the appellants also did not pursue this line of argument before this Court. On the other hand, the contention which is pressed is that when such succession opened to the estate of Rangaswami Naidu on 01.06.1955, Rangaswami Naidu having published B1 notice dated 10.05.1955, a disruption of the joint family was effected and,

therefore, Rangaswami Naidu died separate from his brother. Still furthermore, the appellants case is founded upon B10-Will executed and also got registered on 10.05.1955 by Rangaswami Naidu.[Paras 82, 83 and 85][716-D-H; 717-A-E; 718-A-C]

7. <u>IS THERE CONFLICT BETWEEN KALYANI (DEAD) BY LRS V. NARAYANAN AND OTHERS [AIR 1980 SC 1173] AND BHAGWANT P. SULAKHE V. DIGAMBAR GOPAL SULAKHE AND OTHERS [AIR 1986 SC 79]</u>

The Trial Court, in this case, has laid store by the observations of this Court to the effect that as long as joint family property is in existence and is not in partitioned, the character of the joint family property does not change. It concluded that even if division is brought about by issuance of B1, the properties of the joint family consisting of V. Rangaswami Naidu and his brother remained joint and it could not be arrogated by V. Rangaswami Naidu as his. The first appellate court distinguished the decision by stating that it turned on in facts. There is really no conflict as such. Partition has two shades of meaning in Hindu Law. In the one sense, partition is the first step which would ordinarily culminate in a metes and bounds partition. In a coparcenary, there is joint tenancy. A Hindu Coparcenary, which cannot be created by agreement between parties but is the creation of law, can be disrupted or a division is caused by a unilateral declaration by a coparcener to put an end to the joint family. What the coparcener has to produce before the division, is an interest, as has been referred to in both Sections 6 and 30 of the Hindu Succession Act. Upon a declaration being made, expressing intent to separate without anything more but no doubt on communication of the same to the other coparcener/coparceners, partition in the above sense viz. causing a division of title takes place. The partition in the aforesaid sense has far-reaching consequences. The joint tenancy, which includes the concept of Right to Inherit by Survivorship, is terminated with the partition being effected in the first sense. If the coparcener dies after causing such a partition, as the right on the basis of Doctrine of Survivorship is annihilated, his death, after such partition, would result in his heirs becoming entitled to succeed. In that sense, joint tenancy would be replaced by tenancy in common but that is not the same as saying that the

properties of the family, where there has been a partition in the first sense, will without anything more stand transformed into the separate and exclusive properties of the divided members. This Court is unable to subscribe to the view taken by the First Appellate Court that the principles of law, which are contained in paragraph-14 of the Judgment (in *Bhagwant P. Sulakhe* case) are merely to be understood in the special facts of the said case. Partition, in a broader sense and as is commonly understood, is the division of the properties in accord with the shares. [Paras 97, 98 and 101][733-C-E; 734-C-G; 734-A]

Kalyani (Dead) by LRs. v. Narayanan & Ors. **[1980] 2 SCR 1130;** *K.S. Palanisami (Dead) through LRs. & Ors. v. Hindu Community in General and Citizens of Gobichettipalayam & Ors.* **(2017) 13 SCC 15 : [2017] 4 SCR 511;** *Bhagwant P. Sulakhe v. Digambar Gopal Sulakhe* **AIR 1986 SC 79 : [1985] 3 Suppl. SCR 169 – referred to.**

8.1 <u>WHETHER A HINDU COULD MAKE A WILL?</u>

<u>WHAT WERE THE LIMITS ON HIS POWER TO EXECUTE A WILL? ARE THERE ANY CHANGES BROUGHT ABOUT BY ENACTING SECTION 30 OF THE HINDU SUCCESSION ACT, 1956</u>?

The treatises in Hindu Law do not contain reference to the concept of a will. However, over a period of time, courts have recognised the powers for a Hindu to make a will. This case concerns Mitakshara Law. Thereunder, a Hindu could bequeath his separate and self-acquired properties even prior to the Hindu Succession Act being enacted. A Hindu being a member of the joint family could also possess his separate property which are of various kinds. They include obstructed heritage which is property inherited by a Hindu from another who is a person other than his father, father's father or great grandfather, Government grant, income of separate property, all acquisitions by means of learning (declared by Hindu Gains of Learning 1930). As far as the law governing the making of the will is concerned there was no particular law which governed the same. It is in the year 1865 that the Succession Act came to be passed. It was not applicable

to Hindus. The Hindu Wills Act 1870 which had limited application (it applied inter alia to Wills by Hindus in the town of Madras) no doubt made certain provisions of the Indian Succession Act of 1865 applicable to Hindus. Under the Probate and Administration Act, 1881 the executor, subject to law relating to survivorship was the legal representative of a Hindu. Section 211 of the Indian Succession Act, 1925 continues the same legal position. However, the Indian Succession Act of 1925 which repealed the earlier Succession Act has through Section 57 made the provisions of Part VI which are set out in schedule III to the Act applicable to all wills and codicils made by any Hindu, Buddhist, Sikh or Jain made on or after the 1st January 1927 to which those provisions are not applied under the preceding clauses viz. clauses (a) and (b) Section 57. It is thus that after 1st of January, 1927 in the matter of an unprivileged will executed by a Hindu, the requirement of Section 63 which includes attestation of such a will by a minimum of two witnesses became mandatory. Thus, the execution of a will by a Hindu also came to be regulated from the 1st of January, 1927. Even prior to Hindu Succession Act, a Hindu could execute a will bequeathing his separate and self-acquired property. As regards his authority to execute a will concerning his interest in the property of the joint family of which he is a coparcener, the law did not permit such an exercise. In the case of property of the joint family as long as the property is joint, the right of the coparcener can be described as an interest. The reason for saying this is as long as the family remains joint, a coparcener or even a person who is entitled to share when there is a partition cannot predicate or describe his right in terms of his share. The share remains shrouded and emerges only with division in title or status in the joint family. Once there is a division the share of a coparcener is laid bare. [Paras 102, 104 and 106][735-C-H; 736-A, D-E; 739-A-B]

M.N. Aryamurthy v. M.D. Subbaraya Setty **(1972) 4 SCC 1;** *Jalaja Shedhti & Ors. v. Lakshmi Shedhti & Ors.* **(1973) 2 SCC 773 : [1974] 1 SCR 707;** *Hardeo Rai v. Sakuntala Devi & Ors.* **(2008) 7 SCC 46 : [2008] 7 SCR 1 – referred to.**

"Mulla on Hindu Law" **23rd Edition Page 341-342 (Para 228) – referred to.**

8.2 Even under the law prior to Hindu Succession Act there could be four situations. In regard to a member of a joint Hindu family who also has his separate property he could bequeath his separate property. As far as joint family property is concerned, there could be three situations. The first situation is where the family remains joint in which case the coparcener would have an interest. As far as this interest is concerned, it could not be the subject matter of the will prior to the Hindu Succession Act. The second situation is in a case where there is a disruption in title or a division in status. That is there is a partition in the sense of a division in the joint family status caused by any unequivocal declaration by a coparcener which is communicated. It can be by words. It can be by conduct. It can also embrace the very filing of a suit for partition. When such disruption takes place then the share of the coparcener in the joint family property becomes a reality and takes concrete shape in accordance with law and the rights of the members of the family. This may or may not be accompanied simultaneously with a metes and bounds partition. In such a scenario under the law prior to the Hindu Succession Act, having achieved disruption in the joint family, the right based on the principle of survivorship perishes. The share of the coparcener becomes undeniable. Should he die intestate the share would go not to the other coparceners by survivorship but to his heirs. It also opens the door to the coparcener to exercise his right to bequeath his share in accordance with his wishes. This power was certainly available to a Hindu even prior to Section 30 of the Hindu Succession Act. The third scenario would be a situation where following a division in title or status in the family there is also a metes and bounds partition of the properties of the family in accordance with the share. It cannot be open to doubt that in fact, capacity of a Hindu to bequeath such property existed even prior to the Hindu Succession Act. In fact, the property obtained as a share on a partition by a coparcener who has no male issues is treated as his separate property. As regards the effect of a son born after partition this Court need not pronounce on the same. After the amendment to the Succession Act 2005 including the daughters of a coparcener as coparceners in their own right, if a Hindu has a female issue then the property allotted to him on partition will partake of the nature of coparcenary

property. After the passage of the Hindu Succession Act even without there being a partition in the sense of a declaration communicated by one coparcener to another to bring about the division it is open to a Hindu to bequeath his interest in the joint family. In other words, the words "interest in coparcenary property" can be predicated only when there is a joint family which is in tact in status and not when there is a partition in the sense of there being a disruption in status in the family. [Para 107, 108][739-G-H; 740-A-G; 741-C-D]

"Mulla on Hindu Law": **23rd Edition [Para 228 clause (6) at Page 342] – referred to.**

9.1 <u>THE IMPACT OF THE HINDU WOMENS RIGHT TO PROPERTY ACT, 1937 (XVIII OF 1937)</u>

Section 3 of the 1937 Act applies when a Hindu dies intestate. Section 3(1) of the 1937 Act deals with the case of the Hindu dying intestate leaving behind separate property. In such a situation, should there be one widow, she became entitled in respect of the property to the same share as the son. This was made subject to sub-Section (3) which declares that, the interest devolving on her, would be a limited interest known as Hindu Woman's Estate. The more important change that was brought about is located in Section 3(2). Thereunder, when a Hindu governed by any School of Law, other than Dayabagha or Customary Law, dies, leaving behind at the time of his death, an interest in a Hindu Joint Family property, his widow is conferred the same interest as her husband had. This is again made subject to the provision of sub-Section (3) which makes it a limited interest known as the Hindu Woman's Estate. The Legislature had not used the words "dies intestate" in Section 3(2), whereas, in Section 3(1), the Legislature contemplated a situation, where a Hindu could bequeath his separate property and has taken care to provide only for a contingency where he died intestate. No doubt Section 2 proclaimed that Section 3 was to be applied when a Hindu died intestate. When it comes to Section 3(2), in regard to a case covered by Mitakshara law, the Legislature has, in keeping with the law as then prevailing, recognised that a Hindu could not execute a Will in regard to his interest in a Hindu Joint Family. It is this concept, which has been swept away by enacting

the E*xplanation* to Section 30 of the Hindu Succession Act, whereunder, it is open to a Hindu to even bequeath his interest in the Hindu Joint Family property. Coming back to Section 3(2) of the Hindu Women's Right to Property Act, the Legislature has advisedly chosen the words "interest in the Hindu Joint Family property", which may be contrasted with the provisions under Section 3(1), which contemplates the Hindu leaving behind separate property. Therefore, Section 3(2) contemplates the situation, where, at the time when the Hindu dies after the enactment of the Act in 1937 (it came into force on 14th April, 1937 and it was repealed by Section 31 of the Hindu Succession Act 1956), in order that the widow acquires the same interest as her husband had under Section 3(2), the Hindu must die when he is not separated from the joint property. If a Hindu, when he dies, is separated and, at least, *qua* him, there is no Hindu Joint Family, it would not be a case where Section 3(2) would apply. A Hindu when he dies intestate he may have an interest in a Hindu joint family and at the same time also have separate properties. Then qua his separate properties, Section 3(1) would apply whereas in regard to his interest in the joint family, Section 3(2) would govern. Section 3(1) cannot apply as the properties in dispute were not his separate properties.The position at law may therefore, may be culled out as follows:

> **With the passing of the 1937 Act, in areas to which it applied, an intrusion was indeed made upon a coparceners right to set-up a claim to the property of a deceased coparcener based on the Doctrine of Survivorship but the Act did not annhilate the said Right. The Right to claim by Survivorship came to be suspended but not extinguished. The widow, though not a coparcener, was like a coparcener in most respects. She was also conferred with the right to claim partition. As long as she did not claim partition and the property remained intact upon her death, the Right to Claim by Survivorship which stood eclipsed, revived and the coparceners would become entitled to the property on the basis that succession opened as if the coparcener died when the widow died. On the other hand, if the widow claimed partition, her interest transformed into a defined interest**

and the Right to Claim by Survivorship, which stood suspended, was destroyed. The property would then enure to the heirs of the husband. It is also to be noted that, by virtue of Section 3(2), there is no rupture in the coparcenary. There is no division brought about by Section 3 (2) of the 1937 Act, in other words.

The Court must also not be oblivious to two developments which took place after succession opened to the estate of V. Rangaswami Naidu on 01.06.1955. The Hindu Succession Act, 1956 containing Section 14 came to be passed. Secondly, R. Krishnammal the widow, filed O.S. No. 71 of 1958 wherein as an alternate prayer, she sought partition. The principle which has been laid down about the effect of a demand for partition by a widow in whom the Right came to be vested under Section 3(2) of the 1937 Act has already been noticed. But, the supervening Legislation in the form of the Hindu Succession Act, if it did confer absolute rights under Section 14(1), it is a matter of law as to what was the nature of the Right R. Krishnammal possessed, even when she instituted O.S. No. 71 of 1958. It is clear that when succession opened to the estate on 1.6.1955 if Section 3(2) applied, then Lakshmiah Naidu would have only a suspended right of survivorship. There is the compromise decree in OS 71 of 1958 under which R. Krishnammal has given up all her rights in the plaint schedule properties in favour of the Lakshmiah branch. [Para 108][742-F-H; 743-A-F; 745-B-H; A-B]

Satrughan Isser v. Sabujpari and Others **AIR 1967 SC 272 : [1967] 1 SCR 7 – relied on.**

8.2 The legislative recognition of this concept of 'interest' in joint family is found in Section 6 of the Hindu Succession Act. Section 6 prior to its substitution by Amending Act 39 of 2005 provided that in the case of male Hindu dying after the Act possessing an interest in Mitakshara coparcenary property, the property was to devolve by survivorship, subject to the proviso. What is of greater relevance is the terms of explanation. The terms of the explanation I as it stood which is retained as the explanation in sub-section (3) of Section 6 after the amendment. Therefore, the concept that what a coparcener in a Mitakshara family had prior to partition, is an interest, is reiterated. For the

purpose of Section 6, however, in order to determine the extent of that interest it is deemed to be the share which he would get if there was a notional partition just prior to his death. Partition in the sense of a disruption however determines the extent of share which would devolve under Section 8 of the Act. It is made clear that this Court must not be treated as having pronounced that the notional partition contemplated under the explanation to Section 6 is meant to bring about the demise of the coparcenary as such. The Explanation to Section (30) also speaks of 'interest' as being 'property' which a Hindu could after the Hindu Succession Act bequeath. [Paras 109, 110][746-B-G]

10.1 <u>WHAT IS TITLE OF V. RANGASWAMI NAIDU, WHICH HE COULD PASS?</u>

The claim that V. Rangawami Naidu acquired title to the properties by way of oral partition, cannot be accepted. The claim that he had acquired properties by way of self-acquisition, also may not stand. If there has been a disruption in the family status, partition in the narrow sense of a division in title takes place. The mere fact that there is a division effected in the joint family, would not mean that, in law, V. Rangaswami Naidu could claim exclusive and absolute ownership *qua* the items covered under the Will. The plaint schedule properties are, admittedly, part of the properties scheduled to the Will. The result would be that, in terms of the legal principles applicable, V. Rangaswami Naidu did not have exclusive right as such *qua* the properties scheduled under the Will. In this case, having regard to the alternate case set-up based on the rights available to R. Krishnammal, and noticing that some items out of the Will were recognised as her own, and the other items which included items which were included in the Will and also part of the larger joint family property, she has given-up her rights, it cannot be characterised as not using of the opportunity by the Lakshmiah branch to challenge the unilateral allocation by V. Rangaswami Naidu. [Paras 112, 117][747-C-F; 749-G-H; 750-A]

10.2 What would be the position after bringing about a division in title but before there is a partition of the property by metes and bounds? During the interregnum, the properties of the family would continue to remain joint. Unless there is a

partition, *qua*, the properties, though the shares are ascertained by the partition in the sense of a division in the joint family, no coparcener could point to any specific item and claim it to be his. In the case of an alienation by a Hindu, even if it is of a specific property belonging to the joint property, it would be dealt with on an equitable basis, should the alienee bring an action to enforce the same in a properly constituted Suit. The sale of such a right even over specific immovable property by a coparcener in a Mitakshara Hindu Joint Family does take effect in law where it is permitted and it would not be a case of a void transaction. The purpose of undertaking this discussion is to appreciate the law relating to the power of the coparcener to transfer specific items even if there has been no partition in the sense of a division of title so that this Court is in a better position to appreciate the question as to whether in a case where a Hindu executes a Will prior to the Hindu Succession Act could, he, by a Will, after a division is brought about in the family bequeath specific immovable property. The real principle on the basis of which the interest of a coparcener in a Joint Hindu Family could not be the subject matter of a valid bequest was that the bequest would come into collision with the right to claim property by survivorship vested in the other coparceners upon their birth. Thus, it is a case of a prior right taking precedence over the bequest which can come into force only not from the date of the making of the Will but upon the death of the Testator. This distinction, has apparently allowed courts to recognise an inter-vivos alienation which is possible only when the coparcener is alive of his interest in the Joint Hindu Family as it does not involve a conflict between the right by survivorship and rights sought to be created by the coparcener. However once there is a division, then right by survivorship ceases and there can be objection to said principle applying to a bequest of a specified immovable property. In fact, the case of a will made after division of specific immovable property stands on a different footing and the objection that the sale is by a coparcener when the joint family exists does not hold good. The Legatee under the Will, left behind by a Hindu after there is division in the family status in regard to specific properties belonging to the family, would indeed have rights *qua* the property but limited to the share of the Testator. It cannot be a principle of

A **law in the region of controversy that a man cannot ordinarily transfer a right greater than what he himself has. Even under the Indian Succession Act, under Section 59, there could be no prohibition in V. Ranagaswami Naidu bequeathing his share, if there was division. In a bequest, the equitable consideration available to a transferee by an *intra-vivos* transaction, wherein he**
B **has paid valuable consideration, may not apply. But this cannot mean that, if everything else is proved, the legatee should be left remediless. This Court did toy with the idea of considering holding in favour of the appellants even treating it to be an exercise of powers under Article 142 of the Constitution of India**
C **in the special facts of this case as brought out by the testimony of PW1 as regards the inequity involved. No doubt, the frame of the Suit is found hardly helpful to the appellants. But having regard to the fact that the appellants must fail otherwise, this Court need not explore this matter further. [Paras 120, 123, 124 and 128][751-**
D **B; 754-D-G; 755-A-C; 756-D-G]**

Sidheshwar Mukherjee v. Bhubaneshwar Prasad Narain Singh and Others **AIR 1953 SC 487 : [1954] SCR 177;** *M.V.S. Manikayala Rao v. Narasimhaswami and Others* **AIR 1966 SC 470 : [1966] 1 SCR 628 – referred to.**

E *Aiyyagari Venkataramayya and Another v. Aiyyagari Ramayya* **(1902) ILR 25 Madras 690;** *Venkatachela Pillay v. Chinnaiya Mudaliar* **(1870) 5 M.H.C.R. 166 – referred to.**

11. <u>DOES THE WILL EFFECT A DIVISION?</u>

F **The Will starts off with the statement by the Testator that he owned the properties which included properties allotted in a partition and also which he acquired by independent purchases. Thereafter, he states that he had been a divided member since 1932 onwards. None of these statements would constitute a**
G **declaration. The case of partition in 1932 and independent purchases have been found against the appellants by three courts. Thereafter, there is only the statement that he has, in order to avoid any uncertainties, made an open declaration of his divided status 'today'. It may be difficult for this Court to accept this statement as a declaration sufficient in law to cause a division.**
H **However even for a moment that it would work out as a**

declaration, the law laid down by this Court in Addagada Raghavamma, may pose obstacles insuperable in nature, for the appellants. While it may be true that under the Doctrine of Relation Back and proceeding on the basis that the contents, as noted in the Will, amounted to a clear declaration to separate and that it would have effect from 10.05.1955, this Court cannot be oblivious to the creation of the vested rights. If the matter is to be governed under Section 3(2) of the 1937 Act, as already noted, it must be a case where V. Rangaswami Naidu died intestate. Therefore, if this Court proceeds on the basis that there is a Will as indeed it must to accept the case of the appellants, Section 3(2) will not apply. If Section 3(2) does not apply, the claim to the property by survivorship, would arise, which would be fatal to the appellants case. In the facts of this case, in view of the division being communicated through the Will only after the succession had opened, and even allowing for the division to have effect from 10.5.1955 when the will was made, the vested right of Lakshmiah Naidu to claim by survivorship would spring into existence on 01.06.1955 when his brother died and the subsequent communication based on the Will cannot take away vested right which became available proceeding on the basis of the Will relating to the plaint schedule properties [Para 130][758-D-H; 759-A-C]

Addagada Raghavamma and Ors. v. Addagada Chenchamma and Ors. **AIR 1964 SC 136 : [1964] 2 SCR 933 – relied on.**

12. WHETHER THERE IS LACK OF PLEADING ABOUT B1 CAUSING A DIVISION IN THE JOINT FAMILY?

In the facts of this case, the principle that no amount of evidence can be looked into, if there is no pleading, is in apposite. As to how the joint family status was disrupted or as to whether there was no division in status, is essentially a matter of evidence. The mere fact that it is not specifically averred, as to the mode by which the division was brought about is not fatal to the appellants case, if it is otherwise established. [Para 137][761-E-F]

13. WHETHER THE CONTENTS OF B1 AMOUNT TO A DECLARATION TO EFFECT DIVISION

That there was no oral partition is found unassailable. Therefore, the statement in B1, about the same, needs to be ignored being incorrect but the last sentence is capable of standing as a stand alone statement. The use of the word 'also' appears to be deliberate. It would also probablise that there was legal advice which preceded both making the Will and the drafting of the Notice. B10-Will contains the statement about having made a notice. As long as the coparcener wishes to separate, he is not required to give any reason to separate.[Paras 138, 139][761-G-H; 762-D]

14. WHETHER THERE WAS COMMUNICATION TO THE OTHER COPARCENER

108. B1 has been marked in the Trial Court as dated 12.05.1955. The entire case of the appellants is that the notice was issued on 10.05.1955 and it was published in a newspaper "Navva India" as, admittedly, there is no case for the appellants that the intention to separate, was given by way of a notice directly to V. Lakshmiah Naidu. It was the case of the appellants that noticing the notice in the newspaper, Lakshmiah Naidu responded by issuing a communication dated 11.05.1955, disputing the partition.Still further, the appellant's case is sought to be built around the communication, by V. Rangaswami Naidu on 16.05.1955 to Lakshmiah Naidu reiterating contents of B1. The contents of B1, having regard to the last part, would be sufficient to cause a division in the status of the joint family. The question is whether it was communicated, as is required in law. On the one hand, the communication set up by the appellants dated 11.05.1955 and 16.05.1955 are not produced. This shortcoming is sought to be overcome by the appellants by relying upon the case set up by 'A' Party ('A' party no. 1 was R. Krishnammal, the widow of Rangaswami Naidu and 'A' party no. 2 was R. Krishnammal's nephew and the executor of the Will) as revealed in B2, the order passed by the Magistrate under Section 145 of the CrPC. Regarding B2-Order, passed under Section 145 of Cr.PC a contention is raised that it is not relevant under Section 40 to 43 of the Evidence Act. This question is not seen raised in the courts below. It may be true that Section 40 deals with previous judgments which would constitute a bar to the fresh

proceedings and B2 is, therefore, not relevant under Section 40 of the Evidence Act. Section 41 also deals with judgments rendered in probate, matrimonial, admiralty or insolvency jurisdiction, which has the effect mentioned in Section 41 of the Evidence Act. It is clearly inapplicable to the facts of the case. Section 42 deals with decisions being relevant if they relate to matters of public nature relevant to the inquiry. It is also not relevant. During the hearing, it was pressed before this Court by the respondents that B1 is dated 12.05.1955 and if it is 12.05.1955, the very edifice of the appellant's case would fall to the ground as then it would be impossible to support the position that in response to the notice which is published on 12.05.1955, the reply could be given on the previous date, i.e., on 11.05.1955 by Lakshmiah Naidu. It is here that the non-production of the letters dated 11.05.1955 and 16.05.1955, are sought to be emphasized. This Court did call for the records to verify whether marking of the documents B1 dated 12.05.1955 was a mistake or it did reflect the ground reality. It is found from B1 that Notice is published in the newspaper which is dated 12.05.1955. Therefore, the marking of the document B1, as dated 12.05.1955, is not a mistake. There is a reference in the Will to the publication of the Notice on the said date. The Will is dated 10.05.1955. It appears quite clear that the Will would not have been written on 10.05.1955. It is, no doubt, executed on 10.05.1955. Having regards to the details in the Will and the other circumstances, this Court is inclined to believe that it would have been drafted earlier. Equally, publication of a matter in a newspaper would have been arranged earlier. But what is important is, not merely the intention of the Testator as a coparcener to declare his mind to the other coparcener to separate, and even have it set-out in the Will, and further even going a step further, getting it published, but it must be proved further that, before the Testator passed away, the matter contained in B1 was known to the other coparcener, viz., Lakshmiah Naidu. This requirement is indispensable.There is no case that the Notice was published on two days, *viz*., on 10.05.1955 and 12.05.1955. What is evidence produced before the Court is B1, which is dated 12.05.1955. If that is so, despite the inferences one could possibly draw from the deposition of PW1, it would bring it into collision with the evidence before this Court. If this

Court proceeds on the basis of B1, which is dated 12.05.1955, then, the reply being sent on 11.05.1955, becomes impossible. If there is no reply sent on 11.05.1955, then, it will not be possible to attribute communication of the Notice to separate to Lakshmiah Naidu. In such circumstances, this Court would agree with the High Court that the case relating to B1, though there is a publication made, knowledge of the same cannot be attributed to Lakshmiah Naidu, before the death of his brother. It is not being held for a moment that a Notice in a newspaper cannot serve as a Notice by a coparcener to effect division. However, merely causing a Notice to be published, without there being evidence to show that the intended recipient became aware of it, may not suffice. Though a Notice in a newspaper is purported to serve as Notice to the general public, what is required is Notice to the concerned coparcener. There cannot be a presumption that a person has read a particular newspaper, and even more importantly, that he has read the Notice. Even the case of the appellants appears to be that, on seeing the Notice dated 10.05.1955, the communication dated 11.05.1955 was sent by Lakshmiah Naidu, which this Court found unacceptable, having regard to B1 being dated 12.05.1955. The importance of the reply dated 11.05.1955 was that it would establish knowledge of the Notice by Lakshmiah Naidu. There is no evidence that the Notice published in the newspaper dated 12.05.1955 was known to Lakshmiah Naidu before his death. Since there was no division brought about by V. Rangaswami Naidu before his death in view of the above discussion, the Will would be invalid and therefore it would be the end of the road for the appellants. It is to be remembered that Rangaswami Naidu died on 1.6.1955, which was before the enactment of Hindu Succession Act, 1956. Thus, when he died, he left behind an interest in the Hindu joint family. When succession opened to his estate, it is therefore, the provisions of Section 3(2) of the Hindu Women's Right to Property Act, 1937 which apply. A limited estate in other words sprung into being in favour of R. Krishnammal, his widow. This estate would bloom under Section 14 (1) of the H.S.A. into an absolute estate. When she compromised in OS 71 of 1958 giving up her rights over the property which included the plaint scheduled property in these cases, it conferred absolute rights in favour of the Lakshmiah

Naidu branch. The effect of the death of Rangaswami Naidu being before the Hindu Succession Act came into force is again reiterated to be that it would deprive persons of rights available in respect of a Hindu who dies intestate after the Act came into force. [Paras 140, 142, 147, 148 and 153][762-E-H; 763-A, C-E; 765-C-H; 767-F-H; 766-A; 768-A-G]

15. SECTION 14 (1) VERSUS 14 (2) OF HINDU SUCCESSION ACT 1956

It is recited in the Will that the properties mentioned in 'A Schedule' are bequeathed to his wife, no doubt, for her life. This is a case where the Will itself specifically recites that she is to take income from the properties for her expenses, *inter alia*. She is to make use of the income also for giving presents to his sisters on ceremonial occasions. Therefore, this is a case where the very document, which the appellants lays store by, makes it unnecessary to search for any evidence to find out what is the purpose of giving the property. The Testator has made his motive clear. The argument of the appellants that the very same document refers to the fact that she has been given other properties towards her maintenance, does not detract from the central question as to what impelled the Testator to create the life estate. The Will was executed on 10.05.1955 which is prior to the Hindu Succession Act unlike in the case of *Sadhu Singh*. Obviously, such a Will could not have been executed anticipating the provisions of Section 14(2) of the Hindu Succession Act. R. Krishnammal was certainly entitled to maintenance and the bequest in question expressly refer to the purposes. The properties involved were not bequeathed to R. Krishnammal without her having any right at all. The Will did not purport to bequeath property by way of creating new rights in the facts of this case. Even the case of the appellants is that she was provided for maintenance by giving her other properties as indicated in the Will. If the argument of the appellants is to be accepted, the Court would have to consider the quantum of maintenance which the Testator would consider appropriate. The extent of the other property is not shown. Such an exercise is unnecessary when the terms of the Will indicate that the Testator intended that his widow should be able to maintain herself appropriately from the income

of the properties he was bequeathing to her also, and for that purpose, created, no doubt what can be described as, a limited estate. In such circumstances, the view taken by the High Court that Section 14(1) of the Hindu Succession Act applies, cannot be characterised as erroneous. [Paras 167, 169][780-B-G; 781-E]

Sadhu Singh v. Gurdwara Sahib Narike and Others **(2006) 8 SCC 75 : [2006] 5 Suppl. SCR 799 – distinguished.**

C.Masilamani Mudaliar and Others v. Idol of Sri Swaminathaswami Swaminathaswami Thirukoil and Others **AIR 1996 SC 1697 : [1996] 1 SCR 1068 – relied on.**

16.'POSSESSED' OF IN SECTION 14(1) OF HINDU SUCCESSION ACT, THE PLEADING AS TO POSSESSION OF THE PLAINT SCHEDULE PROPERTY IN O.S. NO. 89/83 AND O.S. NO. 71/58 AND ITS IMPACT.

In Eramma, this Court has made it clear that Section 14(1) of the Hindu Succession Act does not confer title on a mere trespasser. **It does not confer any right on a person possessing property without any vestige of title. These remarks are made in the context of the following set of circumstances:**

Following the death of her husband on 01.06.1955, there are two streams providing right to make a claim over the property in favour of R. Krishnammal, when the Hindu Succession Act came into force. Under the Will, she was conferred with a life estate. If the Will is treated as non-existent or invalid, then, again there can be two situations. Her case would fall to be covered either under Section 3(1) or 3(2) of the Hindu Women's Right to Property Act, 1937 depending on whether the property was separate property of V. Rangaswami Naidu or an interest in the Joint Hindu Family Property. She was also having a right to be maintained. Therefore, in the facts of this case in view of the finding that the properties bequeathed under the Will and which are the plaint scheduled properties are not the separate properties of Rangaswamy Naidu, she would have the right to the properties under Section 3(2) of the 1937 Act. This is observed

for the reason that when the Hindu Succession Act came into force, R. Krishnammal had lost her tussle under the proceedings under Section 145 of the CrPC. The nature of the pleading which she made in O.S. No. 71 of 1958 has also been seen. She specifically states it that she is entitled to recover possession of the property. No doubt, she does aver that she is entitled to treat herself as in joint possession. The decision in *Kotturuswami case*, in fact, came to be considered by another three Judge Bench of this Court in *Mangal Singh and Others v. Smt. Rattno (Dead) by her legal representatives and another* AIR 1967 SC 1786. Noticing Section 14 (1) of the Act and that it covered property possessed by a female Hindu whether acquired before or after the commencement of the Act the Court proceeded to explain the circumstances in which the decision in *Kotturuswami case* was rendered. In fact, this decision was not referred to by the two Judge Bench which rendered the decision in Sadhu Singh. However, it has been adverted to in AIR 1996 SC 172 (para 14) and a very recent judgment of this Court in *Shyam Narayan Sigh and Ors. vs. Rama Kant Singh and Ors.* reported in 2018(1) RCR (Civil) 981 rendered again by a Bench of two learned Judges. In view of the *dicta* in Mangal Singh, this Court feels reassured of its view that Section 14(1) applies. [Para 173][783-E-H; 784-A-B, E; 785-C-E]

Eramma v. Veerupana **AIR 1966 SC 1879 : [1966] 2 SCR 626;** *Gummalapura Taggina Matada Kotturuswami v. Setra Veeravva and Others* **AIR 1959 SC 577 : [1959] 1 Suppl. SCR 968;** *Shyam Narayan Sigh and Ors. v. Rama Kant Singh and Ors*. **2018 (1) RCR (Civil) 981;** *Mangal Singh and Others v. Smt. Rattno (Dead) by her legal representatives and Another* **AIR 1967 SC 1786 : [1967] 3 SCR 454 – relied on.**

CIVIL APPEAL NOS. 1045-1050 of 2013

The appellants claim on the basis of sale deeds executed by A. Alagiriswami, who is the First Defendant in both the Suits. The case, which is sought to be set-up is that, there was a partition among the Legatees of the plaint schedule properties and the properties purchased by them, was among the properties allotted to the First Defendant. Their entire case is based on A. Alagiriswami having rights in the property. A. Alagiriswami has

no rights, for the reasons given. The arguments based on the compromise Decree in O.S. No. 71 of 1958, barring the Lakshmiah branch from questioning the partition or the Will, cannot be upheld. Insofar as it has been held that R. Krishnammal had become the absolute owner under Section 14(1) of the Hindu Succession Act, and having regard to the compromise Decree in O.S. No. 71 of 1958 by which she had given-up all her rights in favour of the respondents, no right vested with A. Alagiriswami which he could have passed to the appellants. The plaintiffs in O.S. No. 649 of 1985, having sought a declaration of their right, and which they were entitled to. The contention that there was no challenge to the sale deeds, may not advance the case of the appellants. DW1, A. Alagiriswami, one of the Legatees has deposed regarding possession. The appellants did not challenge the Decree of the Trial Court and they were apparently sailing along with the appellants who were the Legatees under the Will. There is no merit in any of the appeals. [Paras 175, 176][785-G-H; 786-A-D]

Gaddam Ramakrishnareddy & Ors. v. Gaddam Rami Reddy & Ors. **(2010) 9 SCC 602 : [2010] 11 SCR 656;** *Navneet Lal alias Rangi v. Gokul and Others* **(1976) 1 SCC 630 : [1976] 2 SCR 924 – distinguished.**

Babu Singh and Others v. Ram Sahai alias Ram Singh **(2008) 14 SCC 754 : [2008] 7 SCR 250;** *K. Laxmanan v. Thekkayil Padmini and Others* **(2009) 1 SCC 354 : [2008] 16 SCR 1117;** *Kanwarjit Singh Dhillon v. Hardyal Singh Dhillon* **(2007) 1 SCC 357– relied on.**

Nanni Bai and Others v. Gita Bai **AIR 1958 SC 706 : [1959] SCR 479;** *Krishnabai Bhritar Ganpatrao Deshmukh v. Appasaheb Tuljaramarao Nimbalkar and Ors.* **(1979) 4 SCC 60 : [1980] 1 SCR 161;** *Bhagwan Krishan Gupta v. Praabha Gupta & Ors.* **(2009) 11 SCC 33 : [2009] 3 SCR 393;** *Shivdev Kaur (Dead) by LRs & Others v. R. S. Grewal* **(2013) 4 SCC 636 : [2013] 5 SCR 267;** *Sharad Subramanyan v. Soumi Mazumdar & Ors.* **(2006) 8 SCC 91;** *Bay Berry Apartments Pvt. Ltd. & Ors. v. Shobha & Ors.* **(2006) 13 SCC 737 : [2006] 7 Suppl. SCR 738;** *Usha Subarao v. B.E.*

Vishveswariah **(1996) 5 SCC 201;** *Janki Narayan Bhoir v. Narayan Namdeo Kadam* **(2003) 2 SCC 91 : [2002] 5 Suppl. SCR 175;** *Madhusudan Das v. Narayanibai (Deceased) by LRs. and Others* **(1983) 1 SCC 35 : [1983] 1 SCR 851;** *Benga Behera and Another v. Braja Kishore Nanda and Others* **(2007) 9 SCC 728 : [2007] 6 SCR 853;** *Sashi Jena and Others v. Khadal Swain and Another* **(2004) 4 SCC 236 : [2004] 2 SCR 260;** *Krishna Beharilal v. Gulabchand* **(1971) 1 SCC 837 : [1971] Suppl. SCR 27;** *S. Shanmugam Pillai and Others v. K. Shanmugam Pillai and Others* **(1973) 2 SCC 312 : [1973] 1 SCR 570;** *Puttrangamma and Others v. M.S. Ranganna and Others* **AIR 1968 SC 1018 : [1968] SCR 119;** *Villiammai Achi v. Nagappa Chettiar and Another* **AIR 1967 SC 1153 : [1967] SCR 448;** *State of Bihar v. Radha Krishna Singh and Others* **(1983) 3 SCC 118 : [1983] 2 SCR 808;** *Mst. Karmi v. Amru and Others* **(1972) 4 SCC 86;** *V. Tulasamma v. Sesha Reddy* **(1977) 3 SCC 99 : [1977] 3 SCR 261;** *Shakuntla Devi v. Kamla* **(2005) 5 SCC 390;** *Bhura and Others v. Kashi Ram* **(1994) 2 SCC 111 : [1994] 1 SCR 16;** *Jagan Singh (Dead) Through LRs. v. Dhanwanti and Another* **(2012) 2 SCC 628 : [2012] 2 SCR 303;** *Jupudy Pardha Sarathy v. Pentapati Rama Krishna* **(2016) 2 SCC 56;** *R.B.S.S. Munnalal and Others v. S.S. Rajkumar and Others* **AIR 1962 SC 1493 : [1962] 3 Suppl. SCR 418;** *Gumpha (Smt.) and Others v. Jai Bai* **(1994) 2 SCC 511 : [1994] 1 SCR 901;** *Gulwant Kaur and another v. Mohinder Singh and Others* **AIR 1987 SC 2251 : [1987] 3 SCR 576;** *Bai Vajia (Dead) by LRs. v. Thakorbhai Chelabhai and Others* **AIR 1979 SC 993 : [1979] 3 SCR 291 – referred to.**

Adiyalath Katheesumma and Ors. v. Adiyalath Beechu and Ors. **AIR 1951 MAD 561;** *Sundara Adapa v. Girija* **AIR 1962 (Mysore) 72;** *K. Peramanayakam Pillai v. S.T. Sivaraman and Others* **AIR 1952 Madras 419 – referred to.**

Krishnayya Surya Rao Bahadur Garu and Others (Defendants) v. Venkata Kumara Mahitathi Surya Rao

Bahadur Garu **AIR 1933 PC 202;** *Mohammad Khalil Khan v. Mahbub Ali Mian* **AIR 1949 PC 78;** *Appovier v. Rama Subba Aiyan and Others* **[1866] 11 M.I.A.75;** *Girja Bai v. Sadashiv Dhundiraj and Others* **AIR 1916 PC 104;** *Pandit Suraj Narain and Another v. Pandit Iqbal Narain and Others* **(1912-13) 40 IA 40 : (1913) 11 All LJ 172 – referred to.**

Case Law Reference

[1985] 3 Suppl. SCR 169	**referred to**	**Para 20**
[1959] SCR 479	**referred to**	**Para 20**
[2006] 5 Suppl. SCR 799	**distinguished**	**Para 33**
[1980] 1 SCR 161	**referred to**	**Para 35**
[1964] 2 SCR 933	**relied on**	**Para 35**
[2009] 3 SCR 393	**referred to**	**Para 35**
[1974] 1 SCR 707	**referred to**	**Para 35**
[2008] 7 SCR 1	**referred to**	**Para 35**
[1980] 2 SCR 1130	**referred to**	**Para 35**
[2017] 4 SCR 511	**referred to**	**Para 35**
[2013] 5 SCR 267	**referred to**	**Para 35**
(2006) 8 SCC 91	**referred to**	**Para 35**
[2010] 11 SCR 656	**distinguished**	**Para 35**
[2006] 7 Suppl. SCR 738	**referred to**	**Para 36**
(1996) 5 SCC 201	**referred to**	**Para 36**
[2002] 5 Suppl. SCR 175	**referred to**	**Para 38**
[1983] 1 SCR 851	**referred to**	**Para 43**
[2007] 6 SCR 853	**referred to**	**Para 43**
[2004] 2 SCR 260	**referred to**	**Para 43**
[1971] Suppl. SCR 27	**referred to**	**Para 43**
[1973] 1 SCR 570	**referred to**	**Para 43**
[2012] 7 SCR 933	**relied on**	**Para 47**

[1953] SCR 351	**relied on**	**Para 57**	A
[2004] 1 Suppl. SCR 43	**relied on**	**Para 57**	
[2008] 7 SCR 250	**relied on**	**Para 62**	
[2008] 16 SCR 1117	**relied on**	**Para 63**	
[1968] 3 SCR 119	**referred to**	**Para 92**	B
(1972) 4 SCC 7	**referred to**	**Para 104**	
[1967] 2 SCR 448	**referred to**	**Para 105**	
[1967] 1 SCR 7	**relied on**	**Para 108**	
(2007) 1 SCC 357	**relied on**	**Para 111**	C
[1954] SCR 177	**referred to**	**Para 121**	
[1966] 1 SCR 628	**referred to**	**Para 121**	
[1983] 2 SCR 808	**referred to**	**Para 145**	
(1972) 4 SCC 86	**referred to**	**Para 158**	D
[1977] 3 SCR 261	**referred to**	**Para 159**	
(2005) 5 SCC 390	**referred to**	**Para 160**	
[1994] 1 SCR 16	**referred to**	**Para 162**	
[2012] 2 SCR 303	**referred to**	**Para 163**	E
[1976] 2 SCR 924	**distinguished**	**Para 163**	
(2016) 2 SCC 56	**referred to**	**Para 163**	
[1962] 3 Suppl. SCR 418	**referred to**	**Para 163**	F
[1994] 1 SCR 901	**referred to**	**Para 164**	
[1996] 1 SCR 1068	**relied on**	**Para 164**	
[1987] 3 SCR 576	**referred to**	**Para 165**	
[1966] 2 SCR 626	**relied on**	**Para 165**	G
[1979] 3 SCR 291	**referred to**	**Para 165**	
[1959] 1 Suppl. SCR 968	**relied on**	**Para 172**	
[1967] 3 SCR 454	**relied on**	**Para 173**	
2018 (1) RCR (Civil) 981	**relied on**	**Para 173**	H

A CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 1021-1026 of 2013.

From the Judgment and Order dated 12.10.2007 of the High Court of Judicature at Madras in S.A. Nos. 314 & 315 of 1994, 41 & 42 of 1997 and 690 & 691 of 1998 respectively.

B With

C.A. Nos. 1027-1032, 1033-1038, 1039-1044, 1045-1050 of 2013.

C. A. Sundaram, Mrs. V. Mohana, E. Om Prakash, S. Nagamuthu, Mohan Parasaran, Ms. Chitra Sampath, Basava Prabhu Patil, S. Guru C Krishna Kumar, Sr. Advs., B. Ragunath, Ms. Rohini Musa, Ms. N. C. Zavitha, Ms. Ankita Sharma, Ms. Nikitha Cooper, Zaferinayat, Vijay Kumar, R.Murali, Ms. Madhusmita Bora, Pawan Kishore Singh, R. N. Keswani, M. P. Parthiban, A.S.Vairawan, R. Sudhakaran, Hardik Gautam, Chandra Prabhu, S. Ranjith, Anil Kaushik, Abhishek Mishra, Akash Bhardwaj, Shiv Prakash Pandey, S. Nandakumar, Ms. Deepika D Nandakumar, M. S. Saran Kumar, V. N. Raghupathy, D.S. Ashwin Kumar, V. Balachandran, Siddharth Naidu, Ankolekar Gurudatta, Ms. Rachita Hiremath, K. Parameshwar, M. V. Mukunda, Tushar Bakshi, V. Raghavachari, Mrs. Prabha Swami, Nikhil Swami, G. Balaji, K. K. Mani, Ms. T.Archana, Mrs. Revathy Raghavan, Advs. for the appearing E parties.

The Judgment of the Court was delivered by

K. M. JOSEPH, J.

1. One R. Venkitusamy Naidu had two sons and five daughters. F Lakshmiah Naidu and Rangaswami Naidu were the sons of R. Venkitusamy Naidu. Rangaswami Naidu was married to one R. Krishnammal. They had no issues. Lakshmiah Naidu had four sons, viz., Bakthavatsalam, Venkatapathy, Jagannathan and Ramaswamy. Two civil suits have generated these appeals by special leave before us. O.S. No. 649 of 1985 has been filed by those who claimed under Lakshmiah G Naidu whereas the plaintiff in O.S. No. 89 of 1983 is one of legatees under a Will allegedlyexecuted by Rangaswami Naidu. The plaint schedule properties in both the civil suits are the same.

2. The first suit, viz., O.S. No. 649 of 1985 (as the said suit was initially filed as O.S. No. 2063 of 1982 and it is re-numbered as O.S. No. H 649 of 1985) was filed to declare the title of the plaintiffs to the suit

property and for injunction against the defendants in the suit properties. The relief sought inter alia in O.S. No. 89 of 1983 are as follows:-

> "(a)declaring the title of the plaintiff to an 1/3rd share of the properties described in Schedule I, hereunder or 1/4th share in the properties, described in Schedule II hereunder:
>
> (b) directing the partition of the properties described in schedule I into three equal shares with reference to good and bad soil and granting separate possession to the plaintiff one such share or in the alternative directing a partition of the properties described in Schedule II into four equal shares with reference to good and bad soil and granting separate possession to the plaintiff one such share;
>
> (c) appointing a commissioner to effect the division;
>
> (d) directing defendants 4 to 11 to pay the plaintiff Rs.15,000.00 as past mesne profits.
>
> (e) directing an enquiry into future mesne profits from the date of suit till delivery of possession and pass a decree for such amount as may be determined on enquiry;
>
> XXX XXX XXX."

A CHEQUERED HISTORY; FIRST STAGE

3. This litigation has a chequered history. It all began way back in the year 1955. Proceedings under Section 145 of the Code of Criminal Procedure, 1898 (for short "CrPC") came to be initiated before the First Class Magistrate, Coimbatore as M.C. No. 1 of 1955 and M.C. No. 8 of 1955. Krishnammal, the widow of Rangaswami Naidu was 'A'Party. This was on the basis of the report of the Sub-Inspector of Police dated 04.07.1955 to the effect that there was a dispute regarding the possession of Survey No. 613/04 and 614/03 of Uppilipalayam Village. 'A' party no. 1 was R. Krishnammal, the widow of Rangaswami Naidu. 'A' party no. 2 was the nephew of 'A' party no. 1 and the executor of the Will. 'B' party no. 1 was the elder brother of Rangaswami Naidu, viz., Lakshmiah Naidu. 'B' party nos. 2 to 4 were the sons of Lakshmiah Naidu.

The case set up by 'A' party was in brief as follows:

There was a partition in the year 1932 between 'B' party no. 1 and the late Rangaswami Naidu. Rangaswami Naidu also purchased lands in his own name. He took several lands on lease. 'A' party, in

A short, claimed that they were in posession of the land in question. It was, further, the case of 'A' party that Rangaswami Naidu who was under treatment of cancer but returned to Coimbatore after the first course of treatment was over and was staying in the Bungalow at Race Course had executed a willon 10.05.1955. He appointed 'A' party no. 2,viz., the nephew of his wife as executor. He haddeclared his divided status by way of a notice in newspaper called 'Nava India' dated 10.5.1955. Lakshmiah Naidu, the first among the 'B' party and the brother of Rangaswami Naidu onseeingthe notice responded to the same by communication dated 11.05.1955 to the effect that they were undivided and if Rangaswami wanted to get divided he had to intimate the other co-parceners. It is the further case of 'A' party that Rangaswami Naidu had replied on 16.05.1955 pointing out that the stand of Lakshmiah Naidu in his response dated 11.5.1955 was incorrect. It is also alleged that it was acknowledged on 17.05.1955 by 'B' party no. 1. After 10.05.1955 the health of Rangaswami Naidu took a turn for the worse. He left for Bombay on 20.05.1955. He was still conscious of his duties and was corresponding with others. Rangaswami Naidu passed away in the early hours on 01.06.1955. 'B' party has, had on the other hand contended that Rangaswami Naidu and 'B' party were members of the joint Hindu Family. 'B' party no. 1, viz., Lakshmiah Naidu was sufficiently aged and could not attend to all items of work. Rangaswami Naidu and one of Lakshmiah Naidu's sons wereasked to look after the cultivation of fields. The case of partition in the year 1932 was denied.Rangaswami Naidu became unwell and unable to take food from January 1955 and was fed by tube. In short, the contention of 'B' party was that Rangaswami Naidu continued to be an undivided member.

4. The Magistrate did not undertake any discussion about the will finding it unnecessary. Finding 'B' party in possession and that they were entitled to be in possession until evicted in due course of law by order dated 16.4.1956,the Magistrate held in favour of the 'B' party. 'B' party, it is noted, were Lakshmiah Naidu and his sons. Lakshmiah Naidu passed away on 10.04.1958. The revision petition against the same was dismissed.

THE SECOND STAGE OF LITIGTION

5. The second stage of the litigation is ushered in by the filing of O.S.No.71 of 1958. The plaintiff was R. Krishnammal, the widow of Rangaswami Naidu. The defendants in the said suit L.Ramaswamy

Naidu, L. Bakhtavatsalam, L.Jagannathan and L. Venkatapathy, were all sons of Lakshmiah Naidu. The 5th defendant was one N.V. Rama Chandra Naidu, son of Venkata Swamy Naidu (the executor of the will set up by Krishnamaal). The plaint is dated 10.4.1958 which incidentally is the date on which Lakshmiah Naidu passed away. In brief, the case of the plaintiff, Krishnammal, may be noted as hereunder. Krishnammal reiterated the case set up before the Magistrate that her husband and Lakshmiah were living together jointly as members of an undivided family till 1932. In 1932 there was an oral partition. The properties described in Schedule 'I' to the plaint fell to the share of her late husband RangaswamiNaidu. He had separate possession and enjoyment of those properties. Thereafter, he acquired several other properties in his name. Those properties were scheduled as Schedule IA. Rangaswami Naidu who was an elected member of the legislative counsel developed cancer of the throat. He with an intention of formalizing of the oral partition in 1932 prepared a list of properties both self-acquired and ancestral and a similar list of defendants' properties and sent it to his brother for his approval. Thelist was returned back with certain corrections in the handwriting of Lakshmiah Naidu. Her late husband published a notice on 10/05/1955 in the local daily that he was a divided member since 1932 and he was publishing the notice to make the declaration of his separate share and status. Lakshmiah however was alleged to have assumed the attitude that coparcenary was undivided and disputed the correctness and justness of notice and sent notice dated 11/05/1955. Krishnammal's husband sent a reply on 16/05/1955. The plaintiff Krishnammal also stated that there was a Will on 10/5/1955 and it was duly registered and further that in the will he has referred to the oral partition in the year 1932. Under the Will it wasclaimed that the properties in schedule I and IA were set apart for Krishnammal for life and also made further disposition of the remainder mainly in favour of his sisters' sons. She made reference to the proceedings under Section 145 of CrPC. She also drew inspiration from the stand of Lakshmiah Naidu that the brothers continued to be the members of the Hindu Undivided Family and that in view of the said stand alleged that she must be deemed to be in joint possession along with defendants 1 to 4. Krishnammal claimed that possession by the defendants in properties Schedule I and IA was unlawful. She further stated that as a legal representative of her husband and as legatees under a Will she is bound to adopt the position taken viz., that that her husband was a divided member and that an oral partition

had taken place in 1932 and that the registered will executed by him was valid. In the alternative it would appear she set up the following case:

> "11. The plaintiff however further states that even on the very case set up by R.V. Lakshmiah Naidu in the 145 proceedings and the admission made by him, her rights are even better and as a coparcener she is entitled under the combined operation of Acts XVIII of 1937 and XXX of 1956 to an absolute state in one half of the joint properties and to demand partition and possession of her share. Defendants 1 to 4 are entitled to the other half share. The plaintiff is unable to specify exactly all the properties in the possession of defendants 1 to 4 but as far as she has been able to do so, she has set them out I schedule II. The plaintiff craves leave to add to them as and when she gets better particulars. The plaintiff also prays that the defendants 1 to 4 might be called upon to make a full and true disclosure of the joint family properties in their possession.
>
> 12. The plaintiff states that so far as she is concerned, she is perfectly willing to adopt the defendant's contentions as put forward in the 145 proceedings and that it is not open to the defendants to go back upon the same. Consequently the plaintiff states that in the circumstances, her rights are indisputable and she is entitled to be placed in immediate possession of the properties described in schedule I and I-A pending a final decree in the suit or she is entitled to have a receiver appointed in respect of the properties in all the schedules so as to secure to her, her just rights."

6. Krishnammal further stated that in case the alternative case is accepted, she is entitled to have an account taken as part of the relief of partition of the income of the movable and immovable properties in the hands of Lakshmiah Naidu. Cause of action in the said suit was set out in para 17, as follows:

> "17. The cause of action for the suit arose on 1.6.1955 when Rangaswami Naidu died and on or about June 1955 when the defendant No.1 to 4 unlawfully trespassed on the properties, on 16.4.1956 when the Revenue divisional Officer, Coimbatore, upheld the possession of R.V. Lakshmiah Naidu and his sons and on 26.9.1957 when the High Court refused to interfere with the order

of the Revenue divisional Officer, Coimbatore within the jurisdiction of this Hon'ble Court where the properties are situate.

The relief sought in the said suit was *inter alia* as follows:

"1. for a declaration that the properties inSchedule - I and I-A belong to the plaintiff and for possession of the same with past mesne profitsof Rs.7000/- realized by receiver appointed in 145 proceedings and future mesne profits as may be determined by court.

2. for recovery of Rs.6000/- referred to in para 14 of the plaint:

In the alternative, I, that an account may be taken of what the joint property of the family consists of and the income therefrom from the date of division in status i.e. 10.5.1955:

2. that a Commissioner be appointed to divide the properties by metes and bounds;

3. for a division of the plaint properties into two equal shares and for possession of one such share to the plaintiff.

XXX XXX XXX"

The said suit came to be contested by the defendants 1 to 4 on lines similar to the case set up before the Magistrate in 145 proceedings. The suit however came to be compromised on the following terms. As per the endorsement on the plaint it appeared to the court that the parties had agreed to compromise the matter and noticing the deed of compromise, the following decree was passed and thereafter the terms of the compromise inter alia are set out as follows:

"1. <u>That the plaintiff be and hereby is entitled absolutely to the immovable properties in items 1 to 7 in the schedule described hereunder and that defendants 1 to 4 do put the plaintiff in possession of the same;</u>

2. that defendants 1 to 4 to pay plaintiff monies described in items 8,9 and 13, discharge the decree debt mentioned in item 10 and help plaintiff in getting items 11 and 12 transferred to her name within forty five days from this date and in default, thereof, the plaintiff be at liberty to execute this decree for the aforesaid reliefs.

3. <u>that plaintiffs do have no right or claim in the property belonging to her husband of R.V. Lakshmiah Naidu or defendants 1 to 4</u>

A jointly or individually, except such care as she is already in possession of;

4. That defendants 1 to 4 do pay arrears of income tax if any, and the Estate duty, on the estate of the plaintiff's husband R.V. Rangaswami Naidu and his brother R.V. Lakshmiah Naidu;

B 5. That defendants 1 to 3 do at their own cost and expense, attend to any further dispute regarding the proportion belonging to the family, that defendants 1 to 4 do bear the responsibility in protesting the titles to the properties including the properties allotted to the plaintiff and that plaintiff is not bound to contribute anything

C therefore, that defendants 1 to 4 do have no further rights in the properties taken by the plaintiff and that plaintiff do have no right in respect of the properties whether in the name of R.V. Lakshmiah Naidu or otherwise;

D 6. that plaintiff do act with defendants 1 to 4 is presenting for enhanced compensation for the land …. Of which a sum of Rs.6775/- is now in Court ..C.C. 17/58 on the file of this Court, that defendants 1 to 4 alone be entitled to any such enhanced compensation and that defendants 1 to 4 do bear the entire cost in that proceeding.

E 7. That the parties are at liberty to register this final decree within a week after its being ready;

8. That each party do bear her or his own costs;

There are other details we need not be detained by.

F THIRD STAGE OF LITIGATION

7. This brings us to the third stage of the seemingly unending litigation. Here, the curtain is raised by the filing of O.S.No. 36 of 1963. The plaintiffs in the said Suit are R. Alagiriswami Naidu and V. Kalyanaswami. R. Alagiriswami is the son of one Krishnamaal (sister of one Rangaswami Naidu and Lakshmiah Naidu and different from the

G widow of Rangaswami Naidu). V. Kalyanaswami is the nephew of Rangaswami Naidu and Lakshmiah Naidu through their sister Thayammal. Both of the plaintiffs are among the appellants before us. The defendants were as follows:

H The first defendant in the said case was none other than R. Krishnammal, the widow of Rangaswami Naidu. M.V. Ramachandra

Naiduthe 2nd defendant was the executor of the disputed Will. The third defendant was R. Sounderajan, s/o K.P. Rangappa Naidu yet another nephew of R.V. Rangasamay Naidu and Lakshmiah Nadu. The fourth defendant was A. Alagiriswami, yet another nephewof R.V. Rangaswami Naidu and Lakshmiah Nadu through yet another sister.The 3rd and 4th defendants are also appellants before us. Defendants 5 and 6 were persons against whom the allegation was that the first defendant R. Krishnammal had purported to conveyitems 1 to 3 and 7 respectively to them. In brief, the case set up by the plaintiffs in O.S. No.36 of 1963 was as follows:

> They referred to will dated 10/05/1955 left behind by their uncle Rangaswami Naidu. There is reference made to the life estate in favour of first defendant, the wife of Rangaswami Naidu and the absolute right created in favour of plaintiffs and defendants 3 and 4. Still further there is reference to O.S.No.71 of 1958 and that the suit came to be compromised. It was contended that there was no necessity to enter into such compromise as it was not beneficial to the estate also. R. Krishna had only a life estate. She was not competent and did not represent the interest of the plaintiffs and defendants 3 and 4. The decree insofar as it purported to confer absolute right on R. Krishnammal was not valid or binding on the plaintiffs and defendants 3 and 4. Plaintiffs and defendants 3 and 4 had vested interest in the properties but were not impleaded as parties. It is further alleged that R. Krishnammal could not enlarge her right by any compromise. She had only a life interest. Plaintiffs give a notice dated 10/05/1959 calling upon R. Krishnammal, the first defendant to acknowledge her interest being only a life estate and thus to desist from alienating the property. Para 11 of the plaint may be noticed. It reads as follows:
>
> > "11. The will of R.V. Rangaswami Naidu comprised other properties also other than those described herein which under the compromise decree have been given by the 1st defendant to her husband's brother's sons. The plaintiffs reserve their rights in respect of those properties to a separate action"

Issues were framed in the said suit. The suit came to be amended by order dated 17/10/1970. Defendants 7 to 10 came to be impleaded on the basis of order passed in IA No.925 of 1970. Defendants 7 to 10 were the four sons of Lakshmiah Naidu viz., Bakthavatsalam,

A Venkatapathy, Jagannathan and Ramaswamy. The prayer in the suit was as follows:

> a) Declaring that the 1st defendant has only life estate in the properties described hereunder without any powers of alienation and that plaintiffs and defendants 3 and 4 have a vested remainder in the said properties under the will of the late R.V. Rangaswami Naidu.
>
> b) Directing the 1st defendant to pay the plaintiff the costs of this suit;
>
> and
>
> c) Granting the plaintiff such other and further relief as this court may deem fit and proper in the circumstances of the case.

The said suit also did not culminate in an adjudication by the Court. Instead the parties opted for a compromise. The compromise decree is dated 18.2.1974 and reveals the course which commended itself to the parties and it reads as followsinter alia:

> "The plaintiffs and the defendants 1 and 3 having made a joint endorsement on the plaint and counsel appearing for the defendants 5 and 7 to 10 also having signed in token of their having seen the endorsement, this Court in terms of the joint endorsement both order and decree:-
>
> 1. That the 1st defendant Smt. Krishnammal has only a life estate in the items 5 and 6 of the plaint schedule properties more fully described hereunder, and that the 1st defendant be and hereby is entitled to enjoy the said properties for her life without powers of alienation and after her life – time the said items of properties shall go to the plaintiffs and 1 and 2 and defendants 2 and 4 herein.
>
> 2. That each party do bear his or her own costs in this suit.

Terms of joint endorsement by plaintiffs and defendants 1 to 3 made on 18.2.1974.

> 1. The may be a decree prayed for by the plaintiff in respect of plaint items 5 and 6 alone, viz. S.No.467 0.98 ac.in this 0.82 ac. Within the boundaries in the plaint and S.No.466, 6.02 ac. In this 3.60 ac. Within the boundaries described in

the plaint and situate in Kalapatti village. The 1st defendant is entitled to enjoy the said items for her life without powers of alienation and after her life time they will go to the plaintiffs 1 and 2 and defendant 3 and 4.

The defendants 1 and 2 hereby declare that they have not encumbered or alienated the said items in any manner.

2. The plaintiffs give up the reliefs claimed in respect of plaint items 1 to 3, sold to the 5th defendants, plaint items 4, acquired by the Government and plaint item 7, which has been sold to the 6th defendant. The plaintiffs …. On these items and agree that the aliences are entitled to an absolute title.

3. Each party will bear his or her costs of the suit.

4. The plaintiffs and defendants 1 to 3 pray that there may be a decree on the above terms against defendants 3 and 4 also. No relief is claimed against the other defendants in this suit."

TWO DEATHS

8. Ramaswamy Naidu son of Lakshmiah Naidu passed away in the year 1976. A year later in 1977 R. Krishnamaal, the widow of Rangaswami Naidu also expired.

4TH STAGE

9. After the death of R. Krishnammal in 1977 O.S. No. 732 of 1981 was filed by R. Alagiriswami Naidu. Defendants 1 to 3 in the said suit were V. Kalayanaswamy, Soundararajan and A. Alagiriswami. It will be noticed that the plaintiff and the defendants 1 to 3 therein are the legatees under the Will and are among the appellants before us. The case set up in the said plaint(A16) was inter alia that plaint schedule property in the said case was items 5 and 6 in O.S. No. 36 of 1963 as noticed earlier. The compromise decree in O.S. No. 36 of 1963 entitled R. Krishnammal only to a life interest and the vested remainder was with the plaintiff and defendants 1 to 3. Further, the case of the plaintiff was that in view of the death of R. Krishnammal on 30.04.1977, the plaintiffs and defendants 1 to 3 were in joint possession of the properties. It was complained that the first defendant had purported to sell 1.2 acres to defendants 4 to 5. The cause of action was alleged to arise on the

A basis of compromise decree in O.S. No. 36 of 1963 dated 18.02.1974 declaring the plaintiffs' right to a vested remainder subject to the life estate of R. Krishnammal. The prayer was for a decree of partition.

10. A17 is the written statement which was filed by the 3rd defendant A. Alagiriswami who prayed for a decree of partition and
B allotting his 1/4th share. It is also alleged that the property was in the joint possession of the plaintiff and the defendants.

11. A18 is the decree passed in O.S. No. 732 of 1981. It is dated 21.06.1984 passed by the Additional Sub-Judge, Coimbatore ordering a decree for partition.

C

5th STAGE / THE PRESENT LITIGATION

12. Apparently, the trigger for the present litigation was provided by certain transactions by way of sale entered into by A. Alagiriswami (one of the four legatees under the alleged Will by Rangaswami Naidu). The first of the two suits which has generated the appeals before us
D was filed by eight plaintiffs. It is O.S. No. 2087/82 [However it was renumbered as O.S. No. 649/1985]. The first three plaintiffs are the sons of Lakshmiah Naidu, the 4th plaintiff is the widow of Ramaswamy Naidu who was one of the sons of Lakshmiah Naidu who, as noted, passed away in 1976. Plaintiffs 5 to 8 are the daughters of Ramaswamy
E Naidu.

13. As far as the defendants are concerned, the first defendant is A. Alagiriswami whose actions apparently were the proximate cause of the suit. Defendants 2, 3 and 4 are the other nephews of Rangaswami Naidu who claim under the will. Thus, defendants 1 to 4 are the nephews
F of Rangaswami Naidu and who are legatees under the will and among the appellants before us. Defendants 5 to 26 were arrayed with allegations that certain items of the suit properties were conveyed by first defendant A. Alagiriswami to them. Defendants 27 to 33 are LRs of 10th defendant impleaded vide order dated 29.4.1987. The plaintiffs have reiterated their case as in the previous litigation which is briefly noted as hereinunder:

G

14. Properties belong ancestrally to R. Lakshmiah Naidu and his brother Rangaswami Naidu. Lakshmiah Naidu and his brother Rangaswami Naidu constituted the joint Hindu Family and the plaint schedule property were the joint properties. Rangaswami Naidu died in 1955 without any issues and without any partition, therefore, the suit
H properties, on the death of Rangaswami Naidu being coparcenary

properties on his death, the surviving coparcener Lakshmiah Naidu took all the properties. Krishnamaal, the widow of Rangaswami Naidu was only entitled to limited interest as per the law on that date. The death of Rangaswami Naidu before Hindu Succession Act resulted in the surviving co-parceners taking all the property by survivorship. Reference was made to O.S.No.71 of 1958. It is averred that plaintiffs came to know of the will only after the death of Rangaswami Naidu. Will is described as false, frivolous and untenable. It is averred that the alleged will was executed by Rangaswami Naidu under the undue influence of defendants 1 to 4. Taking advantage of the serious illness of Rangaswami Naidu who was suffering from cancer, defendants seem to be coerced him to execute the will which contains false recitals. Will is not a genuine document. It is also untenable as per Hindu law as it stood on that date. Any will by coparcener of his undivided interest in his property is illegal and invalid. It was for this reason to sustain the illegal will, certain false recitals were put in the will about the oral division that there was an oral division between the brothers. The recital is said to be false and unfounded. Until the death of Rangaswami Naidu, the brothers constituted the joint Hindu Family and there was no division and there was no partition. Thereafter, there is reference to litigation which we have referred to already. Still later allegations were made as follows in para 13 alone. It reads as follows:

> "XIII. Defendants 1 to 4 knowing fully well that their collusive attempt to get at the property have failed miserably started creating trouble and complications. Recently they have purported to convey certain items of the suit property in favour of their own partisans out of ulterior motives. Knowing fully well that the defendants 1 to 4 cannot claim any right to the suit properties on the basis of the will in view of their own prior conduct and also in view of the fact that the said will is invalid and in operative have and fictitious documents in favour of their own partisan out of ulterior motives. The plaintiffs understand that certain items of suit property have been sold by A. Alagirisami, the 1st defendant to defendants 5 to 26. The plaintiffs submit that the …. Are void and in operative. These plaintiffs are not parties to the said also deeds and they are entitled to ignore the said transactions."

It is further stated that in 1960, the plaintiffs have divided their properties in their own right. They have been paying kist for the properties

A all along. They have been paying agricultural income tax on the basis that the properties are their own.

It is also stated that even assuming that Krishnammal acquired life interest in the undivided share of her husband on his death which became subsequently absolute on her death intestate. Her husband's B share had reverted both by survivorship and succession to plaintiffs 1 to 3 and their late brother Ramaswamy. It is further contended that without prejudice to the contentions in the plaint, even if the will executed by Rangaswami is sustainable, the life interest in respect of the properties mentioned in the will conferred on his widow, Krishnammal became absolute by virtue of Act 30 of 1956 with the result that Krishnammal C became the absolute owner of the properties including the suit property.

15. Referring to O.S. No.732 of 1981 filed before the Sub-Court, Coimbatore in regard to claiming partition, it was contended that R. Krishnammal having parted with the suit property in favour of the plaintiffs under the compromise decree in O.S. No.71/1958 in the Sub- D Court, Coimbatore, the defendants 1 to 4 cannot make any claim to the same.The same stood acknowledged by defendants 1 to 4 in proceedings in O.S.No.36 of 1963 and O.S.No.732 of 1981 in the Sub-Court Coimbatore.

16. The plaintiffs sought declaration of title and also prayed for E injunction. It is on the basis that they were in possession and the action of the first defendant (A. Alagiriswami) in executing sale deed in favour of the other defendants was without any authority and they were attempting to disturb the possession of the plaintiffs.

17. OS No.89 of 1983 is the other suit filed by the appellants side F by R. Alagiriswami who is one of the legatees (also the plaintiff in OS No.732 of 1981) and showing defendants 1 to 3 as the other legatees under the Will, defendants 4 to 11 representing the branch of Lakshmiah Naidu and defendants 13 to 33 were the purchasers from the first defendant. In the said suit, the relief sought was for partition of the plaint G schedule property. Plaintiff also sought compensation, mesne profits besides declaration of their right. In brief, the case set up is as follows:

The plaintiff referred to the Will executed by his uncle. He further based the suit on the fact that R. Krishnammal died on 30.04.1977. It was averred that plaintiff and defendants 1 to 3 upon the death of R.Krishnammal have equal right. The properties are in the H

possession of defendants 4 to 6 who were the sons of Lakshmiah Naidu. Reference is made to O.S.No.649 of 1985 and it is pointed out that the said suit is not maintainable. There is reference to the oral division of the properties between Lakshmiah Naidu and Rangaswami Naidu in 1932. There is further reference to the proceeding under Section 145 of the CrPC. Later reference is made to O.S. No.71 of 1958. It was averred that the decree in the said suit was invalid. Under the Will,R.Krishnammal had only the right to enjoy the property during her lifetime. The plaintiff and defendants 1 to 3 were not parties and the decree will not bind them. Thereafter, R. Krishnammal tried to sell the aforesaid property in her possession. Thereupon, O.S.No.36 of 1963 was filed objecting to the sale. There is mention about the compromise. It is their case that defendants 4 to 11 who have joined as parties in that case have supported the compromise which means that it must be considered that they accepted the Will. Written statements were filed wherein as far as the respondents were concerned; they accepted the same stand as they had in the plaint in the suit filed by them.

Both the suits were tried together. A1 to A117 were produced on the side of the plaintiffs in O.S.No.649 of 1985. On the defendants side, who were the plaintiffs inOS No.89 of 1983, B1 to B18 were marked. The trial court treated O.S.No.649 of 1985 as the leading case. C1 is marked as Court Exhibit along with X1 which is thefinger print register in the Registrar's office. By judgment dated 12.08.1989 the learned Additional Sub Judge proceeded to dismiss O.S. No.89 of 1983 with costs whereas O.S.No.649 of 1985 was decreed with costs.

18. The Trial Court after framing issues concluded that the case that Rangaswami Naidu and his brother had orally partitioned the properties in the year 1932, could not be accepted. It is further found that the Will dated 10.5.1955 set up by Rangaswami Naidu, was invalid for the reason that as on the said date, the Hindu Succession Act of 1956 containing, interalia, Section 30 had not come into force since Rangaswami Naidu was joint with his brother and the Hindu undivided family had not been disrupted under the law prior to the Hindu Succession Act. It is also found that the Will was afflicted with many suspicious circumstances. Though the Will was attacked by the legal heirs of Lakshmiah Naidu on the ground that it was procured by coercion and

A undue influence,the said arguments were not accepted. The Trial Court also found that even proceeding on the basis of the Will, in favour of Krishnammal, having regard to Section 14(1) of Hindu Succession Act, the life estate blossomed into absolute rights in favour of Krishnammal which meant the case set up by the appellants that they had the remainder, could not be accepted. The suit filed by the appellants came to be B dismissed whereas the suit filed by legal heirs of Lakshmiah Naidu, came to be decreed. In the appeals, the First Appellate Court agreed with the Trial Court that there was no oral partition as claimed between Rangaswami Naidu and Lakshmiah Naidu. However, the Court finds that having regard to the publication made on 10.5.1955, in the newspaper, C there was a disruption in the status of the Hindu undivided family. It meant that the Will was validly made by the Rangaswami Naidu. The Appellate Court did not find merit in the findings of the Trial Court regarding presence of suspicious circumstances.Revering the finding of the Trial court, the Appellate Court found that having regard to the restricted estate created under the Will, it is Section 14(2) of Hindu D Succession Act and not Section 14(1) which would apply. The First Appellate Court found that it is Section 69 of the Evidence Act which would apply in the facts of the case and not Section 68 of the Evidence Act. In other words, it was found that the present was a case where both the attesting witnesses to the Will were dead. B-7 was a copy of E the deposition of the attesting witnesses. What is required under Section 69 stood proved.That apart, the First Appellate Court noted the fact that the Will was registered andthat the executor appointed under the Will, was the nephew of his wife Krishnammal and this again pointed out to their being no foul play in the matter of the creation of the Will. Exhibit (C-1) was an affidavit filed by the son of the executor in response to F direction to produce original of the Will. The First Appellate Court found that the original Will was, in fact, produced before the Magistrate in proceedings under Section 145 and marking of secondary evidence of the Will, was in fact found justified by both the Trial Court and the First Appellate Court. On the basis of these evidence, the First Appellate G Court allowed the appeals filed by the appellants and decreed O.S. No. 36 of 1963 and decreed partition as claimed by dividing the property into four parts. The suit filed by the respondents came to be dismissed.

19. The High Court, in the second Appeals by the impugned judgment has found that Will could not be relied upon, as the requirement H under Section 68 of the Evidence Act was not fulfilled. (B-7) the deposition

of one of the attesting witnesses to the Will did not establish due execution of the Will,in that, it did not establish the attestation of the Will by the other alleged attesting witness Dr. Iyer. The High Court also found that Section 14(1) of the Hindu Succession Act, 1956 applied.This is on the basis that R. Krishnammal, wife of Ranagasamy Naidu had a pre-existing right to maintenance. Section 14(2) would therefore, not apply. The Will was appreciated in the context of her pre-existing right to maintenance to Krishnammal. This enlarged her limited estate under Section 14(1). On the said basis of the findings and the restoration of judgment of the Trial Court under the impugned judgment, the appeals are filed before us.

A CLOSER LOOK AT THE ISSUES AND FINDINGS OF THE TRIAL COURT

20. The trial court framed 14 issues in O.S.No.649 of 1985 and an additional issue. In OS 89 of 1983 the trial Court framed 3 issues and one additional issue. The trial court answers issue No.1 in O.S.No.89 of 1983 which was whether there was an oral partition as claimed by the appellant between Rangaswami Naidu and Lakshmiah Naidu as follows:

> It is found that it is not clearly proved that there was an oral partition. B1 notice is referred to as letter dated 12.5.1955. It was further found that the notice allegedly sent by Lakshmiah Naidu dated 11.5.1955 was not produced by the plaintiffs or defendants though the trial court referred to B43 produced in Section 145 proceedings. Equally, the notice dated 16.5.1955 which was alleged to have been sent by Rangaswami Naidu was also not produced even though it is noted that B44 was produced in Section 145 proceedings. The Court also referred to the case of Bhagwant P. Sulakhe v. Digambr Gopal Sulakhe[1]. It also noted the argument that by the Will there was a division. It goes to find that though PW1 has stated that Rangaswami Naidu has filed Estate duty returns separately and was paying income tax separately and had separate Bank account, A13 to A15 documents showed that transactions were entered into which showed that the Hindu Undivided Family consisting of coparceners continued jointly even after 1932. This is despite noticing that there was separate acquisition of property by Rangaswami Naidu sought to be established by B3 to B5. These properties are treated as ancestral

[1]AIR 1986 SC 79

A and finally the court has answered issue No.2 in favour of the respondents by holding that there was no oral partition in the year 1932.

Issue no.1 which was whether the Will dated 12.5.1955 had been written by Ranga Samy Naidu and was valid and genuine and whether
B the Will was executed after his death, is answered as follows:

The trial court finds that the original Will was produced before the Magistrate in the proceedings under Section 145 as Exhibit B68 rejecting the contention of the respondents that original Will was not produced even before the Magistrate. The trial court further refers to C1 notice to
C the son of the executor of the Will to produce the Will. It also considers the affidavit filed by the son to the effect that he was not in possession of the Will and finds that the copy of the Will was marked as B10. The trial court then went on to consider how far the Will was genuine and whether B7 could be relied upon. B7 is the deposition given by Venkataswami Naidu who was allegedly one of the attesting witnesses
D to the Will dated 10.05.1955. This deposition was given by him in the proceedings under Section 145 of the CrPC. The trial court went on to discuss his evidence. It found that in the said evidence (B7) the attesting witness has not spoken about the attestation by the other witness. He has deposed that the other witness came and left before the Registrar
E came. The Will was already typed. It is not stated as to who has prepared the Will. The witness has not deposed in B7 that the testator was conscious. It was very doubtful. It was found doubtful as to whether he has executed the Will out of free will. There was on pages 1 and 4 of the Will portions written in ink. They are not referred to at the end of the Will. The original of the Will was also not produced. This led to strong
F doubts. The court took the view merely because PW1 in his previous statement in proceedings under Section 145 has deposed that the signature of Rangaswami Naidu was there in all the pages of the Will, it could not be understood that the respondent had accepted the Will as genuine. The case of the appellants that the other attesting witness who was the
G doctor and a family friend would not have lend his name if the Will was concocted and that B12 was an advertisement issued by the family on the death of the other attesting witness, that is, the doctor also did not appeal to the court and it entered the finding that Will was not genuine. The court also in paragraph 32 notices that the testator had 5 sisters out of which one sister did not have any issue. The 4 other sisters had male
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and female children. The fact that only one son born to each sister was bequeathed the property under the Will, also created doubt. The issue was accordingly answered. It is also found that as it was not proved that there was a partition, the Will would be invalid. The decision of this Court in Nanni Bai and Others v. Gita Bai[2] and Bhagwant P. Sulakhe vs Digambar Gopal Sulakhe And Ors.(supra) were adverted to. Issue No.1 was accordingly answered. The finding was that the Will was not genuine and it was not valid.

21. Issue No.3 was whether Lakshmiah Naidu inherited the property by survivorship. It was found that Rangaswami Naidu died without leaving behind a Will but he was survived by his widow R. Krishnammal. R. Krishnammal had right of maintenance in the half share of the property of Rangaswami Naidu. She had right under the Hindu Women Right to Property Act, 1937. The trial court therefore, answered the issue against the respondents and in favour of the appellants. This means that the finding of the trial court is that the respondents are not entitled to the plaint scheduled property in their own right on the basis that indu Women Right to Property Act, 1937. The trial Court therefore answered the issue against the respondent and in favour of theLakshmiah Naidu became absolutely entitled under Hindu law being the sole survivor upon the death of his brother Rangaswami Naidu.

22. Next issue which is issue No.4 was whether plaintiff in OS No.89 of 1983 and defendant 1 to 3 were estopped by the proceedings under Section 145 CrPC. The issue was answered in favour of the appellantsby holding that they were not made parties and order will not bind them.

23. Issue No.5 was whether the decree in OS No.71 of 1958 was deceitful, invalid and whether it binds the plaintiff (plaintiff in OS No.89 of 1983). This issue was answered as follows:

> It was found that A2 decree in OS No.71 of 1958 resulted in R. Krishnammal the widow being conferred absolute right upon her in regard to Items 1 to 7 in the said suit. It was found that there was no evidence of any deceit. It was further found that in OS No.36 of 1963 (A3) in the written statement filed by R. Krishnammal (A4), it was stated that the compromise was as desired by her. The issue was answered thus against the appellants.

[2]AIR 1958 SC 706

A 24. The trial court thereafter considered Issue No.6 and additional issue No.1 in OS No.89 of 1983. Answering issue No.6 which was whether the decree in O.S. No.36 of 1963 would constitute res judicata, itwas found that there is no bar of res judicata involved as the suit had been compromised. Regarding the additional issue which was whether by virtue of having filed O.S. No.36 of 1963, the bar under Order II Rule B 2 of C.P.C. stood attracted and barred the filing of the OS No.89 of 1983,the court found that permission was not sought from the court to reserve the right to file a fresh suit in regard to property other than those which were scheduled in OS No.36 of 1963. The plaintiff had acted unilaterally in the matter. The Court found that the bar under Order II C Rule2was attracted.

25. Issue No.7 which was whether the case set up by defendant No.1 (A. Alagiriswami) that there was an oral partition between him and plaintiff and defendants 2 and 3, it was answered against defendant No. 1 and it was found that such a partition was not proved.

D 26. Issue No.8 and 10 related to non-joinder, misjoinder and whether defendants 13 to 34 in OS No.83 of 1983 were necessary parties was answered by finding that there was no misjoinder or non- joinder and there was no evidence that there was any unnecessary party. (It must be remembered in this regard that the relevance of defendants 13 to 34 E is that they are persons to whom part of plaint scheduled property stood transferred by the first defendant on the basis of the alleged oral partition).

27. Allied to this issue was issue No.12 which was whether defendants 13 to 34 were entitled to any equitable relief. This issue was answered against defendants 13 to 34.

F 28. Issue No.11 and 13 related to questions ancillary to the issue whether the plaintiff had right in the property and right to partition. Both the issues were answered against the plaintiffs. Then the Court went on to consider issue No.1 in OS No.649 of 1985. The issue was whether R. Krishnammal had absolute right over the property governed by the G Will on the basis of Hindu Succession Act. The Court went on to hold that the right of R. Krishnammal became absolute under Section 14(1) of the Act.

29. Finally, the court took up the issue in OS No.649 of 1985 which was whether the plaintiffs therein were entitled to relief, as prayed H in the plaint and whether they were entitled to injunction. The court

found that the plaint schedule property was ancestral property. The plaintiffs were legal heirs of Lakshmiah Naidu and on the death of Rangaswami Naidu and they became entitled on the basis of the compromise decree passed in OS No.71 of 1958 as a result of R. Krishnammal giving up her right. OS No.649 of 1985 was decreed and OS No.89 of 1983 came to be dismissed.

PROCEEDINGS BEFORE THE FIRST APPELLATE COURT

30. Four first appeals were filed against the common judgment - AS No.194 of 1989 was filed by the plaintiff in OS No.89 of 1989, AS No.195 of 1989 was filed by the same person R. Alagiriswami but as defendant in OS No.649 of 1985 challenging the decree in the said suit. AS No.320 of 1992 was filed by one V. Kalyanaswami who was defendant No.2 in OS No.649 of 1985 challenging the decree therein. V. Kalyanaswami is also the appellant in AS No.225 of 1992 challenging the judgment in OS No.89 of 1983 wherein he was defendant No.2 (be it noted that there was no appeal filed by any of the other defendants including defendant D13 to D34 in OS No.89 of 1983) who were also defendants in O.S. No.689 of 1985.

FINDINGS OF THE FIRST APPELLATE COURT

31. The first appellate court agreed with the trial court that it was not proved that the suit property and the other property were separate property as they were given to Rangaswami Naidu in 1932. The court however finds that this could not lead to the conclusion that Rangaswami Naidu died joint and not separated from Hindu Undivided Family at the time of death. The appellate court finds that by giving B1 advertisement in a newspaper, a division was effected in status. Rangaswami Naidu unilaterally allotted some of the properties of the HUF share and detailed Will was written as would be explained later. The court went on to then hold that he was a member of the Tamil Nadu Legislative Council. He and his brother possessed several properties between 1944 and 1958. PW1 accepted that in addition the family has purchased 1000 acres of land. Sisters of Rangaswami Naidu were leading ordinary life. He was very much attached to his sisters. He was living in the residential bungalow of his sister-Ammani Ammal. He selected one son each of his own sister. Shares in a Mill was given to his brother. The selection of his wife's nephew, as executor was also considered. The court found acceptance of the registered copy of the Will as secondary evidence as "totally correct". Relying upon B7 deposition and Section 69 of the

A Evidence Act, it was found that the requirements of Section 69 of the Evidence Act were fulfilled. Registration dispelled all suspicion. The fact that R1 testator refused to affix the mark impression and insisted on signing, was also relied upon to show that he had sound disposing capacity. The suspicious circumstances noted by the trial court did not appeal to the court as such. B10 Will was found to be genuine. The B burden to prove that the Will was obtained by coercion and undue influence was not discharged by the respondents. The court went on to find that B1 had caused a division in status. It finds that B1 was published by Rangaswami Naidu on 10.5.1955. Lakshmiah Naidu wrote a letter to Rangaswami Naidu on 11.05.1955 rejecting B1 and stated that C Rangaswami Naidu was still continuing as member of HUF. Rangaswami Nadu sent a reply letter on 16.05.1955 confirming B1. They were marked as B43 and B44 is Section 145 proceedings. Rejecting the argument of the respondents that there was no issue raised as to whether division was effected vide B1 newspaper statement, it found that there was pleading in the written statement of defendant No.1 and D in the counter statement of the other defendants. Plaintiffs and the respondents were not surprised as regards the contention that it was not open to a member of an undivided family to unilaterally allot property to his share, as was done by Rangaswami Naidu. It was found meritless and supported as follows:

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> Respondents did not raise any objection regarding unilateral allotment in OS 71 OF 1958 and OS 36 of 1963. Secondly, it was noticed that there were more than 93 items amounting to 100s of acres belonging to HUF and what was unilaterally allotted was only a small part of the properties. The court finds that "it could F not think of that as totally unjustified". The court noticed the decision of this Court in Bhagwant P. Sulakhe case (supra). This was dealt with by holding that that was a case where there was a problem of partnership and it was so decided. The letter of Rangaswami Naidu dated 16.05.1955 was relied upon wherein he confirmed B1 advertisement and it G was found that it was unable "to consider this as a unilateral act of declaration" and to decide that this act does not change the joint family character of the properties. It is stated that regarding the problem, it is decided that B1 created a division in status. Even though Rangaswami Naidu did unilateral allotment, H Lakshmiah Naidu and sons accepted the unilateral allotment in

their subsequent conduct and therefore not entitled to challenge the Will. A

32. The argument of estoppel raised against the appellants based on the conduct of the appellants in OS No.36 of 1963 in accepting the absolute title of R. Krishnammalin items No.1 to 3, 4 and 7 was found without merit. It found that items 1,3 and 4 were items sold by R. Krishnammal to defendants 5 and 6 in the said suit.Item No.7 was the land acquired by the government. It was found that there was no evidence to reveal on what basis defendants 1 to 4 have acted qua the compromise in regard to the properties sold and item acquired by the Government. It was found further that the compromise was with regard to the items sold and acquired and even the court cannot decide this situation as acting against the appellants. Thereafter, the Court finds that in B10 Will, 19 items of properties are mentioned. Items 1 to 7 to which R.Krishnammal was given absolute title under the compromise decree were scheduled as suit properties in OS No. 36 of 1963. The argument of the respondents that as the appellants had accepted that R.Krishnammal has abandoned her right in the other property in OS No. 71 of 1958 those properties were not scheduled in OS No. 36 of 1963 and the bar of Order II Rule 2 would apply, was repelled. The Court found that the plaintiff in OS No. 36 of 1963 had reserved the right. Secondly the bar of Order II, Rule 2 will not apply having regard to the death of R. Krishnammal much after 1963, which was in 1977. It was found that Order II Rule 2 cannot apply, as in 1963 the plaintiff did not have the right which accrued to them (legatees) only upon the death of R.Krishnammal as absolute owners under the Will. It was further found that the decree in OS No. 36 of 1963 further diluted the compromise decree in OS No. 71 of 1958 wherein R. Krishnammal was conferred absolute title in items 1 to 7. Under decree in OS No. 36 of 1963 the sons of Lakshmiah Naidu were joined as parties. They had appointed an advocate. The advocate has made a joint endorsement for the compromise decree. Under the decree in OS No. 36 of 1963, the right over items 5 and 6 was by way of reserving life interest in favour of R.Krishnammal and this was found to be against respondents. Thus, a right under the Will was conferred by the conduct of the parties. Regarding the controversy qua Section 14 of the Hindu Succession Act, it was found that R.Krishnammal had prayed for the right under Section 14 (1) only as alternative relief in OS No.71 of 1958. The court found it unable to decide that the absolute right given to R.Krishnammal in OS No. 71 of

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1958 was given in accordance with her right under Section 14 (1) and had it being the case the appellants should have been made parties and the executor of the Will would not have been exonerated. It was found that R. Krishnammal had no intention to obtain absolute right under Section 14 (1). It was further found that the conduct of the respondents was in a manner that she should not get her share in property. Lakshmiah Naidu and his sons conducted proceedings under Section 145 to withhold property in their possession. In OS No. 71 of 1958 they gave items 1 to 7 by a pittance for the compromise. R.Krishnammal, it was held, accepted her estate for life as something was better than nothing. It was found noteworthy that in OS No. 71 of 1958, it was not openly stated by R. Krishnammal that she had a right under Section 14 (1) and she has abandoned all the properties except items 1 to 7 therein. The compromise decree in OS No. 36 of 1963 revealed that the parties intended to follow the Will, as could be seen from bestowing life interest in items by them by diluting the compromise decree in OS No. 71 of 1958. Accordingly Appeal No. 195 of 1989 and Appeal no. 20 of 1989 were allowed. OS No. 649 of 1985 was dismissed. Appeal No. AS No. 194 of 1989, AS No. 225 of 1992 were also allowed setting aside the judgement in OS No. 89 of 1983, the said suit was decreed. It was ordered that schedule II properties should be divided into 4 equal shares and one share should be allotted to the plaintiff. A preliminary decree for partition was passed and further mesne profit was to be decided based on application under Order 20 Rule 12 CPC.

FINDINGS OF HIGH COURT IN THE IMPUGNED JUDGMENT

33. In one common judgment, the High Court disposed of the second appeals. It found that both the courts had concurrently found that there was no proof that there was a partition in 1932. It went on to find that in such circumstance, the question was whether there was a division before the death of Rangaswami Naidu. It notes that there is no issue raised that a division was brought about by issuing B1. The first appellate court, it was noticed, framed specific issue of division based on B1. Based on B1, division of status was not proved. It went on to agree with respondents that the plaintiff in OS No.89 of 1983 relied upon B1 dated 12.05.1955 while the first defendant in OS No.649 of 1985 in the written statement has stated that Rangaswami Naidu had issued the public notice on 10.05.1955 that he was a divided member

from his brother since 1932 for which a notice was issued on 11.05.1955 and for which a reply was also given by Rangaswami Naidu. It was further found that apart from the newspaper "Navva India" dated 12.05.1955, no other document was filed in the proceedings. The court found there is absolutely no reason to conclude that there was any division between the brothers before Rangaswami Naidu died. It is further stated that it is not in dispute that the publication stated to have been effected by Rangaswami Naidu, is on the basis of the previous partition between him and his brother in 1932 and inasmuch as the courts have concurrently held that there was no prior partition and in absence of any proof of separation by Rangaswami Naidu with his brother before his death, the finding of the first appellate court, was described as baseless. It was found that it was doubtful whether RangaswamiNaidu had any right to make a Will. The original Will was not produced. The plaintiff (the plaintiff in OS No.89 of 1983) did not take any steps to produce the Will. None was examined though the registration book from the Sub-Registrar was summoned and marked as X1. The Magistrate in Section 145 proceedings did not discuss the Will and the appellant-plaintiff in OS No.89 of 1983 placed sole reliance on the order of the Executive Magistrate. It is further noticed that the Will was presented for registration as per the endorsement at the residence of Ammani Ammal whereas in B7 deposition of the attesting witness, the registration took place at the home of the deceased. In the absence of the original Will and non-compliance with the requirement of Section 68 and 69 of the Evidence Act, the court found that the Will was not proved. Registration of the Will does not dispense with the proof of the Will. It agreed with the findings of the trial court in this regard. The Executor is stated to have died in 1990 but no steps were taken to produce the Will during that time. It was not known why the plaintiff did not take steps to summon the records of proceedings under Section 145. R. Krishnammal acquired right under Section 14(1) of the Hindu Succession Act on the basis of the compromise. The rights of R. Krishnammal opened on 01.06.1955 when her husband died. R. Krishnammal had right to maintenance which was an existing right. The High Court distinguished the judgment of this Court in Sadhu Singh v. Gurdwara Sahib Narike and Others[3]. By virtue of that right under Section 14(1) she had entered into the compromise in OS No.71 of 1958 and this was entirely recognised by the appellants. The appeals were allowed and the decree of the trial court was restored.

[3]2006 (8) SCC 75

A CONTENTIONS OF PARTIES

THE DEBATE IN THE COURT AND THE WRITTEN SUBMISSIONS

34. We have heard the learned counsel appearing for the parties. We heard Shri C.A. Sundaram, learned Senior Counsel who led the B arguments on behalf of the appellants. We heard Mrs. Mohana and Shri V. Giri, learned Senior Counsels also, on behalf of the appellants. We further heard Shri Mohan Parasaran, Shri S. Guru Krishnakumar, Mrs. Chitra Sampath, and Shri V. Raghavachari, learned Senior Counsel, on behalf of the respondents. This is besides noting the submission of C Shri S. Nagamuthu, learned senior counsel on behalf of some of the alienees from defendant No. 1 in OS 649/ 1985.

35. The appellants were led by Shri. C.A. Sundaram, learned senior counsel. He contended that the High Court had in the impugned judgment transgressed the limits under Section 100 of the CPC and re-D appreciated the findings based on facts which was impermissible. He no doubt also does not invite us to find that there was an oral partition in the year 1932 but he contended that before Rangaswami Naidu died on 01.06.1955 by virtue of issuing B1 paper advertisement, the requirement in law for bringing about a division in the status of the Hindu Undivided Family was achieved. He took us to the terms of B1 and submitted that E there is an unequivocal declaration of Rangaswami Naidu being separated. Response by his brother by communication dated 11.05.1955 purported to dispute the contents of B1. This fact was harnessed to contend that the requirement in law that not only a member who wishes a division in the joint family to be brought about, should communicate his intention F but the communication should reach the other coparceners, was fulfilled. The elder brother did respond and till further, lending credence to the case set up by the appellant communication dated 16.05.1955 was issued by Rangaswami Naidu reiterating his stand manifested in Exhibit B1. It is not the law, learned senior counsel pointed out, that there must be any reason at all for a member of the Hindu Undivided Family to severe its G connection with the family and to withdraw as it were from the undivided status. All that is required is an unequivocal declaration which is communicated and the same was achieved issuing in B1. He would further submit that the Will was indeed genuine and free from taint or suspicious circumstances, which at any rate was found by the first H appellate court which is the final court on facts. Rangaswami Naidu

was indeed fond of his sisters. He did not have any issues. It is only natural and probable that therefore finding that death was not too far away he wanted to provide for both - his wife in the form of life estate and also to bequeath the absolute right in the 4 legatees (appellants before us) and he has drawn from each of the 4 branches of his sisters. The evidence given by the attesting witness in Section 145 proceedings fulfilled the requirement of Section 69 of the Evidence Act, as was correctly found by the first appellate court. In regard to the discrepancy in the date of Exhibit B1, viz., that it is shown in the Appendix to the trial court judgment as being dated 12.05.1955 it is only a mistake and the date is actually 10.05.1955. In regard to the requirement to be fulfilled to bring about a division in joint family he relied on the following judgments:

1. Krishnabai Bhritar Ganpatrao Deshmukhv. Appasaheb Tuljaramarao Nimbalkar and Ors.[4];
2. Addagada Raghavamma and Ors.v.Addagada Chenchamma and Ors.[5]
3. Adiyalath Katheesumma and Ors.v.Adiyalath Beechu and Ors.[6];

The appellants also relied upon B2 order passed in the proceedings under Section 145 CrPC to show that Rangaswami Naidu declared his divided status vide communication dated 10.05.1955. Another contention addressed is that even the execution of the Will amounted to declaration of status. Reliance is placed on Addagada Raghavamma case(supra) and Bhagwan Krishan Gupta v. Praabha Gupta& Ors[7]. The execution of the Will shows thatRangaswami Naidu was in control of specific properties. Evidence of R. Krishnammal and the executor in the will in 145 proceedings establishes that testator was capable of dealing with the properties and executing Will in respect of portion of his huge estate. Reliance is placed on the judgment of this Court reported in Jalaja Shedhti& Ors. v. Lakshmi Shedhti & Ors.[8],

[4]1979 (4) SCC 60
[5] AIR 1964 SC 136
[6] AIR 1951 MAD 561
[7]2009 (11) SCC 33
[8]1973 (2) SCC 773

A Hardeo Rai v. Sakuntala Devi & Ors.[9] and Kalyani (Dead) by LRs v. Narayanan & Ors.[10]. It is the submission of the appellant that Rangaswami Naidu was capable of identifying and disposing of properties in the Will. Rangaswami Naidu has purchased properties in his name with his money which was dealt with by him as his own portion. Partition by metes and bounds is not mandatory. The requirement of Section 69 of the Evidence Act stands fulfilled on perusing the deposition of one of the attesting witness in Section 145 proceedings. The signature of the testator was identified by PW1 himself. The original Will has been produced in Section 145 proceedings. R. Krishnammal has based her case on the will in 145 proceedings and in the subsequent suits, viz., OS No.71 of 1958 and OS No.36 of 1963. The respondents however admitted to a compromise though an issue was framed regarding the Will. We are reminded that the Will is a registered document and that registration is a solemn act. It is the contention of the appellants that the wording in the Will and the surrounding circumstances clearly show the intention of Rangaswami Naidu to be that he wanted some properties of his estate to go to his sisters' sons with whom he was very affectionate. Our attention is drawn to the reasoning of this Court in K.S. Palanisami (Dead) through LRs & Ors. v. Hindu Community in General and Citizens of Gobichettipalayam& Ors.[11]. It is the further submission of the appellant that R. Krishnammal, the widow has only limited estate during her lifetime which does not blossom into absolute right under Section 14(1) of the Hindu Succession Act. It is contended that the primary relief sought by R. Krishnammal in OS No.71 of 1958 was itself based on the right under the Will. She never claimed under Section 14(1) of the Hindu Succession Act. She knew the intention of the testator and accepted it by her conduct. The property bequeathed to her was only limited estate with onerous condition that she has to maintain sisters etc. and on her death the property was to devolve upon her sisters' sons. Considerable reliance was placed upon the judgment of this Court in Sadhu Singh's case

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[9]2008 (7) SCC 46
[10]1980 (2) SCR 1130
H [11]2017 (13) SCC 15

(supra). Taking us through the Will the appellants contend that the testator has provided other properties for the maintenance of Krishnammal, and therefore, it could not be argued that the plaint schedule property which are included in the Will were given in lieu of her right to maintenance which should become absolute after passing of the Hindu Succession Act. Reliance is placed on the following judgments:

(1) Shivdev Kaur (Dead) by LRs & Others v. R. S. Grewal[12]

(2) Sharad Subramanyan v. Soumi Mazumdar & Ors.[13]and

(3) Gaddam Ramakrishnareddy & Ors. V. Gaddam Rami Reddy & Ors.[14]

36. As regards the finding of the High Court that the suit filed by the legatee is barred under Order II Rule 2, it is contended that though there is a vested right under Section 119 (1) of the Indian Succession Act in favour of the appellants (legatees), the cause of action to sue in respect of the bequeathed property arose only after the death of R. Krishnammal. O.S. No.36 of 1963 was a protective action to deal with R. Krishnammal purporting to alienate certain properties. Plaintiffs-appellants in OS No.36 of 1963 were not parties to the suit in 1958 and the compromise in OS No.71 of 1958 will not bind the appellants. R. Krishnammal, the widow did not have any right to deal with the properties which were given to her by way of life estate. She could not have entered into compromise without including the appellants. The decree is described as void ab initio and therefore, there is no need to declare that decree or any transaction thereon as such. Still further it is contended that perusal of the plaint in OS No.36 of 1963 would show that plaintiffs have reserved their rights in respect of the rest of the properties to initiate separate action. The respondents have agreed for a declaration that Krishnammal had only a life estate and they are therefore estopped from contending that R. Krishnammal had absolute right. The cause of action arose only after 1977 on the death of R. Krishnammal. Reliance is placed on judgments of this Court in Bay Berry Apartments Pvt. Ltd. & Ors. Shobha & Ors.[15] and Usha Subarao v. B.E. Vishveswariah[16]. It is contended that Krishnammal did not have any

[12]2013 (4) SCC 636
[13]2006 (8) SCC 91
[14]2010 (9) SCC 602
[15]2006 (13) SCC 737
[16]1996 (5) SCC 201

A right to give away the properties which was not for any legal necessity or family necessity. The transaction itself has been challenged as fraudulent and collusive in OS No.89 of 1983 and an issue was also framed. A contention is also taken that the compromise decree was not registered and therefore could not convey any title to the respondents. It is also submitted that the challenge made to the will in the year 1982 is B barred by limitation. It is further contended that respondents are estopped from challenging the validity of the will in the light of admitting the existence of the Will and compromising the suits OS No.71 of 1958 and OS No.36 of 1963. The High Court erred in decreeing OS No.649 of 1985 without declaring earlier compromise decree between the same C parties in OS No.71 of 1958 and OS No.36 of 1963 as null and void. Any such declaration would be barred by limitation in the year 1982. Under the decree in OS No.36 of 1963 R. Krishnammal had only the life estate and Section 14(2) would apply. The right to the property by survivorship which was set up by the respondents was negatived by the trial court and no appeal was carried against the same. It is also the D submission of the appellants that even on the death of Krishnammal on the basis that she had acquired absolute right under Section 14(1), the brothers and sisters' sons were equally entitled to 1/8th share in the entire 50 per cent of the property which fell to the share of Rangaswami Naidu.

E 37. We also heard Shri V. Giri, learned senior counsel for the appellants. Shri Nagamuthu, learned senior counsel canvassed contentions for the transferees from the 1st defendant in OS No.89 of 1983 and complained that their contentionshas not been considered and accepted.

F 38. We notice the following submissions by Mrs. V. Mohana, learned Senior Counsel on behalf of the appellants. There are sufficient pleadings in regard to the division of status. The newspaper in "Navva India" dated 10.05.1955 has never been disputed. She drew our attention to the evidence of the Executor in the proceedings under Section 145 of the CrPC. The declaration was communicated. Rangaswami Naidu had G the capacity to bequeath the properties. The brothers were dealing with the properties separately. In this regard, reliance is placed upon judgments of this Court in Hardeo Rai v. Sakuntala Devi and others[17]. It is not necessary to prove partition by metes and bounds. The original Will was produced before the Magistrate in proceedings under Section 145 of the

H [17] (2008) 7 SCC 46

CrPC. The Will is a registered document. The Will has been proved under Section 33 of the Evidence Act. The Magistrate Court is a Court. Reliance is placed on Krishnayya Surya Rao Bahadur Garu and others (Defendants) v. Venkata Kumara Mahitathi Surya Rao Bahadur Garu[18]. The earlier proceedings in O.S. No. 71 of 1958 is not binding upon the appellants. R. Krishnammal did not have the right to deal with the properties. The Decree in O.S. No. 71 of 1958 was void. Appellants have never abandoned their rights. Principle of Order II Rule 2 of the CPC will not apply. Though the appellants had vested rights they could not have filed the case for getting possession till the death of R. Krishnammal. As per the compromise Decree in O.S. No. 71 of 1958, rest of the properties were in the control of the plaintiffs. Therefore, they have reserved their right in O.S. No. 36 of 1963. The issue of Order II Rule 2 of the CPC was never argued nor any finding was given by the High Court. In the Suit for Partition, there is a prayer for possession. Anyways, the partition could be effected only when the final Decree Proceedings are over. The question of limitation was never agitated by the respondents, and at any rate, the period begins to run only in the year 1977. The Will is not in lieu of maintenance. The case falls under Section 14(2) of the Hindu Succession Act. Attempt has been made to distinguish decision of this Court in Bhagwant P. Sulakhe v. Digambar Gopal Sulakhe and others (supra). Shri Om Prakash, learned Senior Counsel in his written submission in Civil Appeal Nos. 1027 to 1032 of 2013, would contend, inter alia, that division and severance of the joint family stood proved. He lays store by the judgments of this court in Addagada Raghavamma and another v. Addagada Chenchamma and another[19], Janki Narayan Bhoir v. Narayan Namdeo Kadam[20] and Hardeo Rai (supra). The Will is covered under Section 63 of the Evidence Act and Section 68 of the Indian succession Act. The right in the joint family properties, devolving by survivorship, is negatived by the all the courts below and there is no appeal against such finding and there is no cross appeal.

CIVIL APPEAL NO. 1039-1044 OF 2013

In the Written Submission, it is sought to be contended that the challenge to the Will made by the plaintiffs (in O.S. No.649 of 1985) in the year 1982 is barred by limitation. They are estopped in view of the

[18]AIR 1933 PC 202
[29]AIR 1964 SC 136
[20](2003) 2 SCC 91

compromise in O.S. No. 71 of 1958 and O.S. No. 36 of 1963. Without declaring Compromise Decrees, in the earlier two cases null and void, O.S. No. 649 of 1985 could not have been decreed. Such a relief is barred by limitation in the year 1982. Section 14 (1) of the Hindu Succession Act does not apply in view of the Compromise Decree in O.S. No. 36 of 1963. The case based on survivorship was rejected by the Trial Court and, against the same, no appeal was filed by the plaintiffs. If the finding under Section 14(1) is confirmed, then, on the death of R. Krishnammal, by operation of law, the brother's and sister's son are equally entitled to 1/8th share in the entire 50 per cent of the property which fell to the share of V. Rangaswami Naidu. Since, the plaintiffs had knowledge of the Will in the Section 145 of the CrPC proceedings, they were not entitled to challenge the Will in 1982.

39. In C.A.No.1045-1050 of 2013, the appellants are among defendants 13 to 34 in OS No.89 of 1983. They are also defendants in the other suit (O.S. No. 649 of 1985). It is their contention that they purchased 7 acres and 4 cents from A. Alagiriswami who is defendant No.1 in OS No.89 of 1983 and also the first defendant in OS No.649 of 1985. The said purchase was prior to the filing of the suit and after the Hindu Succession Act, 1956 came into force. After referring to Section 14(1), it is contended that the right given to R. Krishnammal for a lifetime became her exclusive right after the said Act came into force. After referring to Section 14(2), it is pointed out that even according to Lakshmiah Naidu on their contention that the will is not genuine and there was no partition, there would not be any restriction under Section 14(2) for having absolute right by R. Krishnammal under Section 14(1). Referring to the Compromise Decree in OS No.71 of 1958, it is stated that when there was no objection by the sons and grandsons of Lakshmiah Naidu now they cannot raise dispute about partition in 1932 and the execution of the will. Upon the death of Rangaswami Naidu in 1955 and R. Krishnammal on 30.4.1977 under oral partition between the family of the sister of Rangaswami Naidu, the property purchased by the appellants came into possession of A. Alagiriswami from whom they purchased. None of the parties till date challenged their sale deed and the sons of Lakshmiah Naidu filed O.S. No.649 of 1985, after 3 years of sale without even challenging the sale. Interference by the High Court with the findings is complained against.

40. Mr. Guru Krishnakumar, learned senior counsel appearing on behalf of the branch representing Lakshmiah Naidu submitted that the

declaration B1 is shrouded in serious doubt. The discrepancy in the date viz., that it is dated 12.05.1955 and not 10.05.1955 looms large. Even while accepting the document before this Court, the date of B1 was conspicuously left out. The cross examination of PW1 and the reliance placed on the same is misplaced. Secondly, it is further contended that B1 is an unsigned document. No witness has deposed that the testator arranged for its publication. Further, it is contended that the declaration seeks to reaffirm the alleged partition of the year 1932 which partition has not been believed by three courts. B1 could not be believed independent of the alleged partition. Once the alleged partition was disbelieved B1 would have no legs to stand on. It is contended that the words relied upon by the appellants is in past continuous, insofar as it says "I also hereby make a declaration of my divided and separate status", it was not to be from that date that the severance was to take effect. The findings of the first appellate court are attacked as being perverse for the reason that response to B1 and the rejoinder to the same which were marked as B43 and B44 in the proceedings under Section 145 were not exhibited in the present proceedings. B2 order does not reveal any findings on the same. It is further contended that partition is used in a narrow and wide sense. B1 even if relied upon would only result in separation of status but not actual partition by metes and bounds. Reliance is placed in Addagada Raghavamma v. Addagada Chenchamma[21]. The position at law is pointed out to be that the members of the undivided family even after a unilateral communication of severance of status must agree to a particular portion of the property being earmarked to a member. Reliance is placed on the judgment of this Court in Nanni Bai & Ors. V. Gita Bai Rama Gunge[22] and Bhagwant P. Sulakhe v. Digambar Gopal Sulakhe & Ors.(supra) besides Kalyani (Dead) by LRs v. Narayanan and Others(supra). It is pointed out that in Addagada Raghavamma case(supra), this Court did not consider the specific issue as to whether specific items of property could be unilaterally willed without the consent of the other coparceners or without partition by metes and bounds. The non-production of the original will is made a ground of attack. The finding of the trial court that the original will was produced in Section 145 proceeding is also pointed out to be the product of error. No steps were taken to produce the Will. The reliance placed on B7 deposition which is the deposition in proceedings under Section 145 of the CrPC is impugned

[21]AIR 1964 SC 136
[22]1959 SCR 479

as being not binding as the proceedings under Section 145 could not be the forum for establishing the Will. Adjudication under the said provision could not be used as conclusive evidence to prove the Will in view of Section 41 of the Evidence Act. Reference is also made to Section 42 of the Evidence Act. It was further contended that the ingredients of Section 69 of the Evidence Act have not been met. It is pointed out that without conditions of Section 69 being not met for the purposes of Section 145 CrPC, the same evidence could not be used to rely upon for the purpose of Section 68 of the Evidence Act. Further it is contended that the evidence which did not fulfil the requirements of Section 68 could not be used to prove the Will under Section 69 of the Evidence Act. Even otherwise, it is contended B7 falls short of the requirement when there is no evidence to prove the signature of the testator, the original Will not having been produced. The exercise should not be undertaken as DW1 does not even know the signature of the testator. It is pointed out that suspicious circumstances surrounding the Will has not been explained. The argument that Will could be taken as a declaration of the severance of status is disputed. It is pointed out that the Will was communicated only with the proceedings under Section 145 which was after the death of the Rangaswami Naidu on 01.06.1955 on which date the partition had opened under the Mitakshra Law. It is also contended that the Section 33 of the Evidence Act does not apply. This is for the reason that under the explanation to Section 33 it would apply where a person claims under the party in the other proceedings. It is contended that the appellant (the plaintiff in OS No.89 of 1983 apparently) has not claimed under Krishnammal. It is further contended that Section 14(1) of the Hindu Succession Act would apply.

41. Learned senior counsel appearing on behalf of the respondent-Shri Raghavachari, contended as follows:

> There was no partition. Paper publication dated 12.05.1955 spoke of an earlier division. The unilateral declaration is unacceptable. Suspicious circumstances include testator being bed ridden being in his last days as he was suffering from the cancer of the food pipe and was being fed by a tube and not being conscious are referred to. The question of letting in secondary evidence did not arise. The alleged Will contains inked portion and interlineations. It is further contended that OS No.71 of 1958 was filed by the widow R. Krishnammal for partition of the joint family properties

in which suit she had enlisted all 93 items of the joint family properties and claimed half share. The suit was compromised and she accepted 16 items and confirmed rights to 77 items in favour of the sons of Lakshmiah Naidu. R. Alagiriswami and V. Kalyanaswami (among the appellants before us) filed OS No.36 of 1963 and the children of Lakshmiah Naidu were also made parties. The right of R. Krishnammal to enter into a compromise in OS No.71 of 1958 was challenged as according to them she had only a life interest. R. Krishnammal, the defendant contended that she had absolute right under Section 14(1) and hence the authority to enter into compromise. Entering into a compromise in OS No.36 of 1963 by taking two items out of 16 items after the lifetime of R. Krishnammal meant that the plaintiffs in OS No.36 of 1963 accepted the superior rights of R. Krishnammal and they gave up their claim and accepted the sale to third parties effected by R.Krishnammal of 5 items. Reference is also made to OS No.732 of 1981 filed by the plaintiff also in OS No.36 of 1963. In the said suit plaintiffs have sought to divide the two items which they secured in OS No.36 of 1963. Our attention is drawn to the pleading in OS No.732 of 1981 to the effect that the properties belong to one R. Krishnammal which was allotted to her share in OS No.71 of 1958 and the said properties were in her possession till her death. In other words, it is pointed out that right was not set up under the will. The right was abandoned in 1974 and which abandonment was affirmed in 1981 thus attracting the principles of estoppel, acquiescence and waiver. The contention is also taken that OS No.89 of 1983 is hopelessly barred by limitation even proceeding on the basis that there is a Will and that will is true, Section 14(1) of the Hindu Succession Act would apply.

42. Shri Mohan Parasaran, Senior Advocate would submit inter alia that there is no pleading for the case of severance. The Will was not proved in accordance with law. The proceedings under Section 145 of the CrPC were summary in nature and not inter-parties. The subject matter was possession. Therefore, the evidence adduced in the said proceedings should not be used. The right available to Krishnammal was under Section 14(1). The bar under Order II Rule 2 applied.

43. Smt.Chithra Sampath, learned senior counsel appearing for some of the respondents contended that plaint schedule property was in

A the possession of the respondents (the children of Lakshmiah Naidu) right from the time of proceeding under Section 145. While this was the position yet there is no prayer for recovery of possession in OS 89 of 1983. Any such relief would be barred by limitation.Relying on the judgment of this Court in (2007) 12 SCC 695, it is contended that since there is no pleading regarding division of status is O.S. No. 89 of 1983 and in the Written Statement in O.S. No. 649 of 1985, in spite of the specific plea of the respondents in O.S. 649 of 1985 that there was no division, no amount of evidence can be looked into. There is no issue framed regarding division. The Appellate Court has relied on documents not filed in these proceedings. The content of the same was not known to the parties as they were not discussed and findings rendered. [This is with reference to the Order passed, Exhibit-B2]. The proceedings under Section 145 of the CrPC are summary in nature and do not bind the Civil Court. There is no communication to bring about a division of status prior to the death. Reliance is placed on Madhusudan Das v. Narayanibai (Deceased) by Lrs. and others[23]. It is not a case where the Will is lost. Relying on Benga Behera and another v. Braja Kishore Nanda and others[24], it is contended that only after pleading and proving loss of original Will beyond reasonable doubt, that secondary evidence could be adduced. In regard to reliance placed on B7, our attention is drawn to the Judgment of this Court in Sashi Jena and others v. Khadal Swain and another[25]. It is contended that the issue involved in the proceedings under Section 145 of the CrPC were related to possession and the issue of Will by Rangaswami was not considered, and therefore, two conditions in Section 33 of the Evidence Act are not met. The other condition is obviously the first condition in the proviso on the basis that that the plaintiff in O.S. No. 89 of 1983 is not tracing his title through the parties in Section 145 proceedings. Suspicious circumstances, including even refusal by the Testator as reflected in X1, to prefixing his thumb impression pointing to his mental condition, are pointed out. Incorrect statements in the Will are enlisted to impugn the Will. The case falls under Section 14(1) of the Hindu Succession Act. Conduct of the plaintiff in O.S. No. 89 of 1983 in filing O.S. No. 732 of 1981, on the basis it was filed, renders it a fit case for applying the principle in Krishna Beharilal v. Gulabchand[26] and S. Shanmugam Pillai and others v. K. Shanmugam Pillai and others[27]. This

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[23](1983) 1 SCC 35
[24] (2007) 9 SCC 728
[25](2004) 4 SCC 236
H [26](1971) 1 SCC 837
[27](1973) 2 SCC 312

is besides pointing out the effect of filing O.S. No. 1936 of 1963 and endorsement in the Plaint that no relief was claimed against the other defendants, thus, making it a case where no right was reserved in O.S. No. 36 of 1963 to agitate their rights in respect of other properties in the Will.

THE PROPERTY AT STAKE

44. The property in dispute, in both the Suits, is the same. In the Will dated 10.05.1955, there were sixteen items. In O.S. No. 71 of 1958, R. Krishnammal was conferred with absolute rights in respect of seven items. The property involved in O.S. No. 36 of 1963 also related to the seven items, which figured in compromise Decree in O.S. No. 71 of 1958, wherein R. Krishnammal was conferred absolute rights. O.S. No. 632 of 1981 relates to items Nos. 5 and 6, in O.S. No. 36 of 1963. The items which are scheduled in the present Suits are the items covered by the Will dated 10.05.1955 other than the seven items, out of which, four were alienated and one was acquired. As far as O.S. No. 71 of 1958, filed by R. Krishnammal, is concerned, since she had an alternate relief claiming partition, it encompassed the entire property belonging to the coparcenary consisting of 93 items. The extent of property involved in the cases before us is a little over 36 acres.

THE EFFECT OF ORDER II RULE 2 OF THE CPC

45. The contention raised by the respondents is, *inter alia*, that O.S. No. 89 of 1983 is barred by Order II Rule 2 of The Code of Civil Procedure, 1908 (hereinafter referred to as 'the CPC', for short) CPC. This is for the reason that when two out of the four appellants have instituted O.S. No. 36 of 1963, they have scheduled only seven items in the said Suit. It was open to the appellants to claim the relief which they have claimed in the present Suit. Having not sued in respect of the items of properties other than the items scheduled in O.S. No. 71 of 1958, they are barred under Order II Rule 2 of the CPC. This is countered by the appellants by pointing out two aspects. Firstly, it is contended that under the Will, though they had vested right, O.S. No. 36 of 1963 had to be instituted when R. Krishnammal-the widow of Rangaswami Naidu had made preparations for alienating the items scheduled in O.S. No. 36 of 1963 and which were covered by the Decree in O.S. No. 71 of 1958. Secondly, it is pointed out by the appellants that under the Will, R.

A Krishnammal-the Widow had a life estate in respect of the plaint scheduled properties. Consequently, as long as she was alive, a Suit of the nature, as is filed, viz., O.S. No. 89 of 1983, could not be filed, when under the Will, R. Krishnammal had the right. It is only upon her death that under the Will, a suit of the nature filed by them, could have been filed. R. Krishnammal died only in 1977.

B

46. In order that provisions of Order II Rule 2 of the CPC apply, there must be identity of cause of action. Thus, on the one hand, while it was open to the appellants to institute a protective action, as was done by filing O.S. No. 36 of 1963, in respect of the properties scheduled threin. On the basis of the cause of action projected in the said Suit, it would certainly not be a bar to the prosecution of the present Suit.

C

47. Order II Rule 2 of the CPC has been a subject matter of a large number of decisions of this Court. Order II Rule 2 (2) of the CPC postulates a situation where a plaintiff omits to sue in respect of any portion of his claim or intentionally relinquishes any portion of his claim.

D Then, he is debarred from suing in respect of the portion so omitted or relinquished. A plaintiff entitled to more than one relief arising from the same cause of action, can do two things. He may sue in respect of all the reliefs arising from the same cause of action in the same suit. He may, if he omits to sue for one or more of the reliefs open to him under

E the same cause of action, seek leave of the court to sue for all such reliefs, and if the court grants such leave, then, he may institute a suit, though based on the same cause of action in the earlier suit, in a fresh suit. The effect of not seeking the leave of the court, however, in regard to any of the reliefs, which it was open to him to sue for on the same cause of action, is that, he is barred from suing for any other reliefs so

F omitted. The difference between Order II Rule 2(2)and Order II Rule 2(3) of the CPC may be noticed. The law contemplates a distinction between a case where a claim arising out of the cause of action is either intentionally relinquished or omitted to be sued upon. Such a claim cannot be the subject matter of a fresh suit. However, when more than one

G reliefs are available stemming from the same cause of action, then, seeking further reliefs than sought in the first suit, except where leave is obtained, would be barred. However, present the grant of leave by the court, his subsequent suit seeking the reliefs which were originally not sought but for which leave is granted, is permissible. The principle of this provision is actually captured in Order II Rule 2 (1) of the CPC

H which is that every suit is to include the whole of the claim which arises

out of the cause of action and which the plaintiff is entitled to make. It further declares that it is open to a plaintiff to omit any portion of the claim. However, the consequences of the same are declared in Order II Rule 2 (2) of the CPC. We notice that similar views have been expressed in the decision of this Court in *Virgo Industries (Eng.) (P) Ltd. v. Venturetech Solutions (P) Ltd.* 2013 (1) SCC 625. In paragraph 9, it was held as follows:

> "9. Order 2 Rule 1 requires every suit to include the whole of the claim to which the plaintiff is entitled in respect of any particular cause of action. However, the plaintiff has an option to relinquish any part of his claim if he chooses to do so. Order 2 Rule 2 contemplates a situation where a plaintiff omits to sue or intentionally relinquishes any portion of the claim which he is entitled to make. If the plaintiff so acts, Order 2 Rule 2 CPC makes it clear that he shall not, afterwards, sue for the part or portion of the claim that has been omitted or relinquished. It must be noticed that Order 2 Rule 2(2) does not contemplate omission or relinquishment of any portion of the plaintiff's claim with the leave of the court so as to entitle him to come back later to seek what has been omitted or relinquished. Such leave of the court is contemplated by Order 2 Rule 2(3) in situations where a plaintiff being entitled to more than one relief on a particular cause of action, omits to sue for all such reliefs. In such a situation, the plaintiff is precluded from bringing a subsequent suit to claim the relief earlier omitted except in a situation where leave of the court had been obtained. It is, therefore, clear from a conjoint reading of the provisions of Order 2 Rules 2(2) and (3) CPC that the aforesaid two sub-rules of Order 2 Rule 2 contemplate two different situations, viz., where a plaintiff omits or relinquishes a part of a claim which he is entitled to make and, secondly, where the plaintiff omits or relinquishes one out of the several reliefs that he could have claimed in the suit. It is only in the latter situations where the plaintiff can file a subsequent suit seeking the relief omitted in the earlier suit proved that at the time of omission to claim the particular relief he had obtained leave of the court in the first suit."

48. In this case, it is true that when O.S. No. 36 of 1963 was instituted, the earlier Suit brought by R. Krishnammal, viz., O.S. No. 71

of 1958, had culminated in a compromise Decree. A perusal of the plaint itself would show that the plaintiffs in O.S. No. 36 of 1963 have adverted to the compromise in O.S. No. 71 of 1958. They have averred in paragraph 7 of the plaint that under the compromise, R. Krishnammal was given the property scheduled in the said Suit (Suit No. O.S. No. 36 of 1963) in lieu of the properties comprised in the Will and some cash. The rest of the properties comprised in the Will were given-up by her in favour of the respondents (the sons of Lakshmiah Naidu) it is averred. Thereafter, it is averred that the defendants claim, i.e., R. Krishnammal claimed absolute title to the properties scheduled in the plaint and which was unsustainable both in law and facts. It is contended further that the entire compromise Decree, more especially, conferring the absolute title to the suit properties therein in R. Krishnammal, was not valid and binding on the two plaintiffs and Defendants 3 and 4, who are the appellants before us. It is further averred that the appellants have vested rights in the properties. They were not impleaded in the suit (apparently, O.S. No. 71 of 1958). It was averred that R. Krishnammal did not represent the interest of the appellants. In paragraph-8 of the Plaint, it is averred that R. Krishnammal could not enlarge her rights by any compromise to which the plaint items were, only some items of the properties comprised in the Will and R. Krishnammal would, in law, be entitled to and could claim only the same interest, i.e., a life estate that she had under the Will. Thereafter, there is reference to a Notice dated 05.10.1959 to R. Krishnammal that she had only a life estate and to desist from alienating them. R. Krishnammal is alleged to have sent a reply containing untenable allegations. It is averred that she claimed, *inter alia*, that the appellants would not be entitled to claim anything under the Will and she was entitled to deal with the properties in any manner she liked. It is further averred that R. Krishnammal was then attempting to create nominal documents in respect of the suit properties to defeat the rights of the appellants. Paragraph-11 of the Plaint being significant, may be noticed:

> "11. The Will of R.V. Rangaswami Naidu comprised other properties also other than those described herein which under the compromise decree have been given by the 1st defendant to her husband's brother's sons. The plaintiffs reserve their rights to respect of those properties to a separate action."

49. It is accordingly that O.S. No. 36 of 1963 was filed seeking a declaration that R. Krishnammal had only a life estate without any powers

of alienation and the appellants have a vested remainder in the said properties under the Will. The word 'said' obviously refers to the items scheduled in OS No.36 of 1963.

50. The Suit (O.S. No. 89 of 1983) is fundamentally premised on the death of R. Krishnammal in 1977 and the blossoming of the full rights of the appellants under the Will. In other words, R. Krishnammal having a life estate under the Will was alive when O.S. No. 36 of 1963 was filed. The absolute right under the Will, in favour of the appellants, dawned only with the death of the life estate holder. In this context, no doubt, we must clarify one aspect. Section 119 of the Indian Succession Act, 1925 (hereinafter referred to as the "Indian Succession Act', for short) deals with the date of vesting of legacy when, *inter alia*, possession is postponed. The provision with the relevant illustration reads as follows:

> "119. Date of vesting of legacy when payment or possession postponed.—Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the Will, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy, and in such cases the legacy is from the testator's death said to be vested in interest.
>
> Explanation.—An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives, or from a provision that, if a particular event shall happen, the legacy shall go over to another person.
>
> Illustrations:
>
> (i) xxx xxx
>
> (ii) xxx xxx
>
> (iii) A fund is bequeathed to A for life, and after his death to B. On the testator's death the legacy to B becomes vested in interest in B.
>
> xxx xxx xxx xxx"

A 51. It is also apposite that we notice Section 19 of the Transfer of Property Act, 1882 (hereinafter referred to as 'the TP Act', for short). Section 19 deals with vested interest. It reads as follows:

> "19. Vested interest.—Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer. A vested interest is not defeated by the death of the transferee before he obtains possession.
>
> Explanation.—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person."

52. Vested interest is different from the contingent interest. The two have vastly different consequences. The death of R. Krishnammal being a certain event, the interest of the remaindermen is a vested interest. The commonality between Section 19 of the TP Act and Section 119 of the Indian Succession Act, and which is apposite to the facts of this case, is as follows:

When under the Will, a life estate was created in favour of R. Krishnammal with an absolute remainder in favour of the appellants, the legacy in favour of the appellants became vested from the time of death of the testator. The possession and the enjoyment of the property, however, under the Will, was the domain of the life estate holder, *viz*., R. Krishnammal as long as she was alive. She, however, had no right to enlarge the boundaries of her right under the Will. This is, no doubt, subject to the impact of supervening Legislation which will be discussed later. By her unilateral act or by even joining together with the third party, it would not be open to life estate holder to defeat the rights of the remainder men. The significance of a case being covered under Section 119 Illustration (III), of the Indian Succession Act, is that with the death of the Testator, the right in the property becomes vested with the

remainder men, from the time of death of the Testator. In other words, upon the death of the legatee under the Will, in whom the absolute right is vested after the transient possession and enjoyment of the life estate holder, a heritable right, which, in fact, arose at the time of the death of the testator, would confer legal rights upon the heirs of the absolute owner under the Will when succession to his estate opens, should he not wish to leave a Will behind. Though the right is vested in the property, the enjoyment of the property with the absoluteness of a full owner under the Will could be done by the appellants only after the death of R. Krishnammal. Having thrown light upon the words 'absolute rights' in the context of Section 119 of the Indian Succession Act, 1925, it is this right which was sought to be made subject matter of a Decree for declaration and partition. It is clear that in the year 1963 or till the death of R. Krishnammal, the rights as sought to be enforced, did not inhere with the appellants as explained. They could not have sought a partition of the plaint scheduled properties while R. Krishnammal was alive.

53. We listen to the words of this Court again in Virgo Industries (Eng.) Private Limited v. Venturetech Solutions Private Limited[28] found in paragraph-11 of the judgment:

> "11. The cardinal requirement for application of the provisions contained in Order 2 Rules 2(2) and (3), therefore, is that the cause of action in the later suit must be the same as in the first suit. …"

54. Thus, be it the omission or intentional relinquishment of a claim arising out of a cause of action under Order II Rule 2(2) or not seeking a relief under Order II Rule 2 (3), the fatal consequences they pose, will arise only if the cause of action is the same. Though we are not oblivious to the fact that the plaintiffs in O.S. No. 36 of 1963 could have sought a declaration about the compromise Decree in O.S. No. 71 of 1958, *qua* all the properties covered under the Will, we would think that, in the facts of this case, the cause of Action in O.S. No. 36 of 1963 and the present Suit (O.S. No. 1989 of 1983) are clearly distinct, having regard to what we have discussed and having regard to the factum of the date of the death of R. Krishnammal. It is significant to note that the cause of action in OS No.36 of 1963 was the threat of alienation of the items scheduled therein. We would perceive O.S. No. 36 of 1963 more as a

[28](2013) 1 SCC 625

protective action by persons who had vested interest in the property under Section 119 of the Indian Succession Act, 1925 (hereinafter referred to as 'the Indian Succession Act', for short). We must also not be unmindful of the principle that cause of action is not to be confused with the relief which is sought. It has more to do with the basis for the relief which is sought. We are only reiterating in this regard, what the Privy Council has laid down, when it said "*it refers to the media upon which the plaintiff asked the court to arrive at a conclusion in his favour*" (See Mohammad Khalil Khan v. Mahbub Ali Mian[29]).

THE IMPACT OF THE PROCCEDINGS AND THE DECREE PASSED IN O.S. NO. 71 OF 1958 AND O.S. NO. 36 OF 1963 AND O.S NO. 732 OF 1981

ESTOPPEL, WAIVER, ACQUIESCENCE

55. O.S. No. 71 of 1958 was a Suit filed by R. Krishnammal. Defendants Nos. 1 to 4 were sons of Lakshmiah Naidu. The Fifth Defendant was the Executor of the Will. R. Krishnammal lay store by the Will executed by her late husband V. Rangaswami Naidu. In the alternate, she also claimed a Decree for Partition, virtually giving-up her right under the Will and on the basis that V. Rangaswami Naidu died *intestate*. The matter did not go to trial. It ended in a compromise. The substance of the compromise is, a few of the items mentioned in the Will, seven items were recognised as absolute properties of R. Krishnammal even though, under the Will, she had only a limited right over those items. R. Krishnammal, for her part, under the compromise Decree gave-up her rights in respect of the rest of the properties. We notice the argument of V. Raghavachari, learned Senior Counsel for the respondents, that there were ninety-three items which would have been impacted if a Partition Decree, as sought by R. Krishnammal, had been passed. In other words, there was a larger body of properties, apparently which belonged to the joint family of the V. Rangaswami Naidu and Lakshmiah Naidu. The properties covered by the Will were only a much smaller part of the larger body of property, which belonged to the joint family. There is evidence to suggest that as found by the First Appellate Court that R. Krishnammal may not have been in a position to demand her full rights as such and she was satisfied with what she could get. But what is far more relevant is, the appellants were not parties to the

[29]AIR 1949 PC 78

compromise. Appellants were not tracing their rights under R. Krishnammal. Appellants were given an absolute right under the Will executed by their uncle V. Rangaswami Naidu. The bequest in their favour created a vested interest within the meaning of Section 119 of the Indian Succession Act, 1925. Of course, the enjoyment and possession of the property was to await the death of R. Krishnammal under the Will. It is quite clear that R. Krishnammal could not have also enlarged the rights of the branch of Lakshmiah Naidu, once she accepted the Will, for she had only a life estate over the properties covered under the Will. The appellants were also not bound by her acts in entering into a compromise seeking to confer absolute rights *qua* those properties, which were subject matter of the Will, in respect of which, they had the right to be enjoyed after the death of R. Krishnammal.

56. O.S. No. 36 of 1963 came to be filed by two out of the four appellants, who are Legatees under the Will. They sought a declaration to the effect that R. Krishnammal could not enlarge her right and she could not alienate the properties (the very seven items, which, under the compromise Decree of O.S. NO. 71 of 1958, were recognised as her absolute properties). It is true that the plaintiffs in O.S. No. 36 of 1963 did not choose to include the plaint schedule properties in the present Suit and seek a declaration *qua* them. There are two aspects to it, which we must bear in mind. Firstly, the cause of action for filing O.S. No. 36 of 1963 was alleged to be the apprehension that R. Krishnammal was about to alienate the seven items over which she acquired absolute rights under O.S. No. 71 of 1958 (In fact, it was alleged that one item was alienated). Secondly, we have already noticed paragraph-11 of the Plaint. Therein, the plaintiffs have revealed their mind to be that they intend to pursue their right *qua* other properties apparently which are the plaint schedule properties in O.S. No. 89 of 1983. We have already indicated that the bar of Order II Rule 2 of the CPC will not apply. There is some merit in the contention of the appellants that the Decree passed in O.S. No. 36 of 1963 did involve watering down the terms of the compromise Decree in O.S. No. 71 of 1958. As on the date of the compromise in O.S. No. 36 of 1963, the position was that four, out of the seven items, had been alienated by R. Krishnammal, whereas, one property had been acquired by the Government. As regards Item Nos. 5 and 6 in the plaint schedule in O.S. No. 36 of 1963, the terms of the Will dated 10.05.1955, came to be reiterated. This is for the reason that in departure from the terms of the Decree in O.S. No. 71 of 1958, under which R. Krishnammal

A was conferred with the absolute rights in respect of Item Nos. 5 and 6, in regard to the very same items, under the compromise Decree in O.S. No. 36 of 1963, R. Krishnammal was only to enjoy the properties during her lifetime and without the power of alienation. In other words, the terms of the Will dated 10.05.1955 are seen reflected and reinforced by the compromise Decree in O.S. No. 36 of 1963. Both, in O.S. No. 71 of B 1958 and O.S. No. 36 of 1963, there is no adjudication by the court. As to what is the expediency which led the parties to enter into the compromise Decree, may not be decisive of the legal rights of the parties which we are called upon to pronounce. The action of the branch of Lakshmiah Naidu, who had also joined as parties in O.S. No. 36 of 1963, C and who were represented by the Counsel, may not obviate the need for proving the Will on the part of the appellants.

57. The further aspect to be noticed is that in the compromise Decree in O.S. No. 36 of 1963, our attention is invited to the fact that the plaintiffs have stated that they are not seeking any relief against the D other defendants which include the Lakshmiah branch. From this, it is sought to be contended that the interest of the branch of Lakshmiah Naidu, which stood secured under the compromise Decree of O.S. No. 71 of 1958, whereunder R. Krishnammal had given up her rights in regard to all properties other than the seven items over which she was conferred absolute rights, was left undisturbed and unimpeached. This conduct is E emphasised before us, to point out that it would constitute a bar by way of principles, including estoppel and acquiescence for the appellants in instituting O.S. No. 89 of 1983 in regard to the plaint schedule properties over which R. Krishnammal had give-up all her rights in O.S. No. 71 of 1958. It is in this regard, we must bear in mind that even in the Plaint, in F O.S. No. 36 of 1963, the properties, other than the seven items, were admittedly not the subject matter of the Suit. More importantly, what is stated in the compromise is that no relief is claimed against the other Defendants in the said Suit. It is equally true that by the passing of the Decree in O.S. No. 36 of 1963, the interest of the Lakshmiah branch was not imperilled. This is for the reason that in regard to Item Nos. 5 G and 6 in O.S. No. 36 of 1963, over which the rights of R. Krishnammal were limited to a life estate with a taboo against alienation bringing it in tune with the terms of the Will under the Compromise did not matter for the branch of Lakshmiah Naidu. This is for the reason that as far as they were concerned, they were already bound by the compromise H Decree in O.S. No. 71 of 1958 whereunder R. Krishnammal had been

conferred absolute rights in regard to Item nos. 5 and 6, *interalia*, and they had lost all their rights. Therefore, the arrangement *inter se* between the appellants and R. Krishnammal, *qua* those properties, was of no concern to them. What they were interested in was the rest of the properties over which they were given absolute rights under the compromise Decree in O.S. No. 71 of 1958. The result is that on the one hand the terms of the Will came to be reiterated under the compromise Decree in O.S. No. 36 of 1963 *qua* Item Nos. 5 and 6. The Decree in O.S. No. 71 of 1958 was otherwise left untouched. We would, therefore, conclude that the passing of a Decree in O.S. No. 36 of 1963, is a matter which is entirely between the appellants and R. Krishnammal. In fact, the Lakshmiah Naidu branch, though made parties to the compromise, were not actually parties to the Decree. They have not signed as parties to the compromise Decree. Therefore, neither the appellants nor the respondents can derive any advantage from either the filing of O.S. No. 36 of 1963 or the passing of the compromise Decree therein.

The plaintiffs in O.S. No. 36 of 1963 have also filed O.S. No. 732 of 1981. The Lakshmiah branch (among the respondents in the appeals) were not parties. It was a Suit for partition of items 5 and 6 scheduled to O.S. No. 36 of 1963. It is obvious that they cannot rely upon principles of *res judicata* or constructive *res judicata* based on O.S. No.732 of 1981, being not parties to the said Suit. What, however, is sought to be urged, is that the premise, on the basis of which the Decree in O.S. No. 732 of 1981 was passed, is completely incongruous with the cause of action in the present Suit. In other words, it is pointed out that in O.S. No. 732 of 1981, the case set-up was R. Krishnammal had rights over the property and this was inconsistent with the case set-up in the present Suit. It was contended that the appellants were estopped from undertaking such a course of action. We could also deduce the following conduct. The cause of action in O.S. No. 732 of 1981 did involve drawing upon the rights secured (*qua* Item Nos. 5 and 6 in O.S. No. 36 of 1963) in O.S. No. 71 of 1958 whereunder the Lakshmiah branch acknowledged rights of R. Krishnammal who also gave-up her rights to properties which included the plaint schedule items in the case. Though, we are not oblivious to the dimensions projected, we would not think that Right to Property, if otherwise is established in favour of the appellants, it would be lost. It cannot be treated as a case of abandonment of rights *qua* the plaint schedule properties (See in this regard Sha Mulchand & Co. Ltd. (In

A Liquidation), By Official Receiver, High Court, Madras v. Jawahar Mills Limited, Salem[30] and Dr. Karan Singh v. State of J&K and another[31]. The respondents who were not parties to O.S. No. 732 of 1981,cannot set-up a case of estoppel.

WHETHER THE WILL DATED 10.05.1955 HAS BEEN
B PROVED

[Sections 33, 68 and 69 of the Evidence Act]

58. The Will in question is an unprivileged Will. The mode of making an unprivileged Will is provided in Section 63 of the Indian Succession Act. In order that a valid Will be made not only, it is necessary that the
C Testator must execute the document but also the execution must be attested by at least two witnesses. What is required is not ordinary witnessing of a document but attestation which is as is provided in Section 63 of the Indian Succession Act.

59. Section 68 of the Indian Evidence Act, 1872 (hereinafter
D referred to as 'the Evidence Act', for short) deals with proof of execution of a document required by the law to be attested. A perusal of the same makes it clear that in the case of a Will, being a document which is required to be attested by Section 63 of the Indian Succession Act, if there is an attesting witness alive and subject to the process of the court
E and capable of giving evidence, then, the Will can be proved only if one of the attesting witness is called for proving its execution.

60. Section 69 of the Evidence Act, 1872, reads as follows:

> "69. Proof where no attesting witness found.—If no such attesting witness can be found, or if the document purports to
F have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person."

61. Though the expression used is 'if no such attesting witness
G can be found, *inter alia*, it bears the following interpretation'. The word 'such' before 'attesting witness' is intended to refer to the attesting witness mentioned in Section 68 of the Evidence Act. As far as the expression 'found' is concerned, it would cover a wide variety of circumstances. It

[30]AIR 1953 SC 98

H [31](2004) 5 SCC 698

would cover a case of an incapacity to tender evidence on account of any physical illness. It would certainly embrace a situation where the attesting witnesses are dead. Should the attesting witness be insane, the word "found" is capable of comprehending such a situation as one where the attesting witness, though physically available, is incapable of performing the task of proving the attestation under Section 68 the Evidence Act, and therefore, it becomes a situation where he is not found.

62. In Babu Singh and others v. Ram Sahai alias Ram Singh[32], the Court laid down as follows in regard to Section 69:

> "17. It would apply, inter alia, in a case where the attesting witness is either dead or out of the jurisdiction of the court or kept out of the way by the adverse party or cannot be traced despite diligent search. Only in that event, the will may be proved in the manner indicated in Section 69 i.e. by examining witnesses who were able to prove the handwriting of the testator or executant. The burden of proof then may be shifted to others.
>
> 18. Whereas, however, a will ordinarily must be proved keeping in view the provisions of Section 63 of the Succession Act and Section 68 of the Act, in the event the ingredients thereof, as noticed hereinbefore, are brought on record, strict proof of execution and attestation stands relaxed. However, signature and handwriting, as contemplated in Section 69, must be proved."
>
> (Emphasis supplied)

63. Dealing with Section 69 of the Evidence Act, we notice the judgment of this Court in K. Laxmanan v. Thekkayil Padmini and others[33]:

> "32. Since both the attesting witnesses have not been examined, in terms of Section 69 of the Act it was incumbent upon the appellant to prove that the attestation of at least one attesting witness is in his handwriting and that the signature of the person executing the document is in the handwriting of that person. DW 3, who was an identifying witness also in Ext. B-2, specifically stated that he had not signed as an identifying witness in respect of Ext. B-2 and also that he did not know about the signature in

[32](2008) 14 SCC 754
[33](2009) 1 SCC 354

A Ext. B-2. Besides, considering the nature of the document which was a deed of gift and even assuming that no pleading is filed specifically denying the execution of the document by the executant and, therefore, there was no mandatory requirement and obligation to get an attesting witness examined but still the fact remains that the plaintiff never admitted the execution of the gift deed and, therefore, the same was required to be proved like any other document."

64. In this case, there is no dispute that both the attesting witnesses were not alive at the relevant time. The questions, therefore, would then arise as follows:

a. Is it still the requirement of law when both the attesting witnesses are dead that:

under Section 69 of the Evidence Act, the attestation as required under Section 63 of the Indian Succession Act, *viz.*, attestation by the two witnesses has to be proved? Or

Is it sufficient to prove that the attestation of at least one attesting witness is in his handwriting, which is the literal command of Section 69 of the Evidence Act apart from proving the latter limb?

b. The further question which would arise is whether exhibit B7, which is the copy of the evidence of the one of the attesting witnesses in the Will, in the proceedings under Section 145 of the CrPC sufficiently fulfils the requirements under Section 33 of the Evidence Act?

65. We will first take-up the issue relating to the impact of Section 33 of the Evidence Act. It is not a matter which is gone into by the High Court. Section 33 of the Evidence Act reads as follows:

"33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.— Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party,

or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided— that the proceeding was between the same parties or their representatives in interest; that the adverse party in the first proceeding had the right and opportunity to cross-examine; that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section."

(Emphasis supplied)

66. The contention of the respondents appears to be only that, in the proceeding under Section 145 of the CrPC, the tussle was between R. Krishnammal and the Executor of the Will who were styled as A Party Nos. 1 and 2 and the B Party, viz., the respondents. The present appellants were not parties. Therefore, the proceeding was not between the same. The other limb of the first *proviso* to Section 33, viz., that in order that Section 33 of the Evidence Act applies, the proceeding is between their representatives in interest is not fulfilled. The contention seen raised is that the appellants, who are the remainder men under the Will, cannot be treated as representatives in interest of R. Krishnammal.

67. Further the nature of Section 145 proceedings is highlighted as not one attracting the 3rd proviso. The interpretation of the word 'representative in interest' has fallen for consideration before the Privy Council in the decision reported in Krishnayya Surya Rao Bahadur Garu and others (Defendants) v. Venkata Kumara Mahitathi Surya Rao Bahadur Garu[34] wherein the Court referred to a large body of case law and after an exhaustive review, held as follows:

"20. Nothing would have been easier, had it been desired so to do, than to follow the English rule, or to require that the party to the first proceeding should be privy in estate with or the predecessor in title of the party to the second proceeding. Instead of using such well-known terms, a much more elastic phrase is employed, and one which is neither technical nor a term of art.

[34]AIR 1933 PC 202

A The legislative authority was, it must be remembered, dealing with a country in which (amongst other institutions) the Hindu joint family involved representation of interest of a kind and degree and in circumstances unfamiliar to English law. In view of this fact, their Lordships cannot but surmise that the omission of strict English legal terminology and the employment of the less restricted phrase 'representatives in interest'' was deliberate and intentional. It will be a question depending for its correct answer upon the circumstances of each case where the question arises, whether there was a party to the first proceeding who was a representative in interest of a party to the second proceeding within the wider meaning which their Lord- ' ships attribute to these words. Turning back to the first proviso, it requires, in their Lordships' view, that the party to the first proceeding should have represented in interest the party to the second proceeding in relation to the question in issue in the first proceeding to which "the facts which the evidence states" were relevant. It covers not only cases of privity in estate and succession of title, but also cases where both the following conditions exist, viz. (1) the interest of the relevant party to the second proceeding in the subject-matter of the first proceeding is consistent with and not antagonistic to the interest therein of the relevant party to the first proceeding; and (2) the interest of both in the answer to be given to the particular question in issue in the first proceeding is identical. There may be other cases covered by the first proviso; but if both the above conditions are fulfilled, the relevant party to the first proceeding in fact represented in the first proceeding the relevant party to the second proceeding in regard to his interest in relation to the particular question in issue in the first proceeding, land may grammatically and truthfully be described as a representative in interest of the party to the second proceeding."

[Emphasis supplied]

68. The word 'representative in interest', in other words, is to be understood liberally and not confined to cases where there is privity of estate and succession of title. He is be such representative of the party in the later proceedings. Answering the two tests, which have been evolved in the facts of this case, the respondents cannot contend that the interest of the appellants was inconsistent with the interest ofR.

Krishnammal and in particular the executor of the Will. It was certainly not antagonistic to their interest. The Will was indeed set-up by R. Krishnammal and the executor. Therefore, it can be safely concluded that the interest of both persons comprised of A Party, which was the protection of the possession, was also in the interest of the appellants. It may be true that the appellants do not derive their title under R. Krishnammal. But the requirements under Section 33 of the Evidence Act are not to be confused with the ingredients to be fulfilled even in a case under Section 11 of the CPC. It cannot be contended that the interest of the appellants lay in answering the question posed in Section 145 of the CrPC proceedings against R. Krishnammal and the Executor in favour of the respondents, who were parties before the Magistrate. The case of the Will was explicitly set up as also the declaration dated 10.5.1955 and further developments. Therefore, the contention based on the third proviso also does not appeal to us. Also not only was there opportunity to cross examine to the B party, it was availed of. The applicability of Section 33 of the Evidence Act also does not depend upon the nature of the decision which is rendered in the earlier proceeding. We would think that on this basis, as Exhibit-B7 and even B13 (deposition by the Executor) indeed is evidence which was tendered in the previous proceeding before the Magistrate who was certainly authorised by law to take evidence, which is relevant for proving the truth of the facts contained therein under Section 33.

69. The further question is, as posed by us, whether despite the fact that both the attesting witnesses were dead, the matter to be proved under Section 69 of the Evidence Act, is the same as a matter to be proved under Section 68 of the Evidence Act. In other words, under Section 68 of the Evidence Act, in the case of a Will covered under Section 63 of the Indian Succession Act, it is indispensable that at least one attesting witness must not only be examined to prove attestation by him but he must also prove the attestation by the other attesting witness [See 1995(6)SCC 213]. This Court has taken the view that while it is open to prove the will and the attestation by examining a single attesting witness, it is incumbent upon him to prove attestation not only by himself but also attestation by the other attesting witness. It is the contention of the respondents that under Section 69 of the Evidence Act, Exhibit-B7 falls short of the requirement of law that attestation of the execution by both the witnesses be proved. After taking us through Exhibit-B7, it was pointed out that it is clear that even in the said deposition, the witness

A has not deposed about the attestation by the other witness, *viz*., Dr. C.S. Ramaswamy Iyer. On the other hand, the contention of the appellants and which has found approval with the First Appellate Court, is that Section 69 of the Evidence Act only requires that the attestation of at least one attesting witness in his handwriting be proved. This is, of course apart from proving that the signature of the testator executing the B document is in the handwriting of that person.

70. We are of the view that Section 69 of the Evidence Act manifests a departure from the requirement embodied in Section 68 of the Evidence Act. In the case of a Will, which is required to be executed in the mode provided in Section 63 of the Indian Succession Act, when C there is an attesting witness available, the Will is to be proved by examining him. He must not only prove that the attestation was done by him but he must also prove the attestation by the other attesting witness. This is, no doubt, subject to the situation which is contemplated in Section 71 of the Evidence Act which allows other evidence to be adduced in proof of the D Will among other documents where the attesting witness denies or does not recollect the execution of the Will or the other document. In other words, the fate of the transferee or a legatee under a document, which is required by law to be attested, is not placed at the mercy of the attesting witness and the law enables proof to be effected of the document despite denial of the execution of the document by the attesting witness. E

71. Reverting back to Section 69 of the Evidence Act, we are of the view that the requirement therein would be if the signature of the person executing the document is proved to be in his handwriting, then attestation of one attesting witness is to be proved to be in his handwriting. In other words, in a case covered under Section 69 of the Evidence Act, F the requirement pertinent to Section 68 of the Evidence Act that the attestation by both the witnesses is to be proved by examining at least one attesting witness, is dispensed with. It may be that the proof given by the attesting witness, within the meaning of Section 69 of the Evidence Act, may contain evidence relating to the attestation by the other attesting G witness but that is not the same thing as stating it to be the legal requirement under the Section to be that attestation by both the witnesses is to be proved in a case covered by Section 69 of the Evidence Act. In short, in a case covered under Section 69 of the Evidence Act, what is to be proved as far as the attesting witness is concerned, is, that the attestation of one of the attesting witness is in his handwriting. The H

language of the Section is clear and unambiguous. Section 68 of the Evidence Act, as interpreted by this Court, contemplates attestation of both attesting witnesses to be proved. But that is not the requirement in Section 69 of the Evidence Act.

72. Now, let us turn to Exhibit-B7. It is apposite that we advert to whole of it:

> "I know the deceased Rangaswami Naidu. He wrote a will and asked me to attest it. I went. He asked me to attest it. The first signature is mine. The will is Ex. P-68. Every page has been signed by the deceased. After he signed the last page, I signed as witness. Doctor C.S. Ramaswami Iyer is the Doctor at Ramanathapuram. He was also present. I as present when it was registered. The Sub Registrar came home. I have also signed before the Sub Registrar. The deceased was sick. He was able to understand things. I am an income tax practitioner.
>
> Cross Exam.: At that time I was living in a place 1½ or 2 miles away from the house of the deceased. I went to the deceased's house at about 10:30 a.m. I signed at about 11-30 to 12 noon. Doctor came after I went there. He came at 11.30 A.M. I do not know whether the Doctor came to attend on him or came purposely for attesting this document. Sub Registrar came later at about 1 P.M. I remained till the arrival of the Sub Registrar. But the Doctor went away. The Sub Registrar went away at 1-30 to 2 P.M. Doctor did not return later. Doctor was there for a total period of 15 minutes. I remember he gave an injection. But I am not sure of it. When I went there the will was already typed. Rangasami Naidu was lying on the bed. He was being fed by tube. When I was there he was fed once. But I do not remember whether any medicine was given. The ink portions in pages 1 and 4 I do not know who had written it in the body of the document. It has not been subscribed here as to who wrote it or typed it. The deceased had an alisces in the head and he was suffering. He was in pain and suffering. I gave him the minimum trouble as interested in his health. At times in order to recoup from the pain and exhaustion he would lie down quietly. Not to disturb him we asked _____ (*sic)* restraint. I cannot say whether at every minute he was conscious or half conscious or in a coma.

A Re-Exam. When he talked to me he was conscious.

(Sd) B. Venkataswamy Naidu, 1-2-56.

Taken down by me in open court, read over and admitted to be correct. (Sd) K.S. Narasimhan, EFCm. 1-2-56."

B (Emphasis supplied)

73. We must also be detained at this stage by another aspect about Section 69 of the Indian Evidence Act. Section 69 speaks about proving the Will in the manner provided therein. The word 'proved' is defined in the Evidence Act in Section 3, as follows: -

C "Proved.- A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

D 74. Therefore, the question would be whether having regard to the evidence before it, the Court can believe the fact as projected in the evidence as proved. We say this to clarify. In a case, where there is evidence which appears to conform to the requirement under Section 69, the Court is not relieved of its burden to apply its mind to the evidence and find whether the requirements of Section 69 are proved. In other E words, the reliability of the evidence or the credibility of the witnesses is a matter for the Court to still ponder over. As far as this case is concerned, the evidence of one of the attesting witnesses is contained in B7 and which we have found relevant under Section 33, establishes that he was an Income Tax Practitioner. He was beckoned by Rangaswami Naidu, F informing him that he had written a Will and it was to be attested. He was asked to in fact to attest even upon going there on that day. He speaks about the testator signing on every page and also, he has spoken about him signing. He, no doubt, therefore establishes requirement of Section 69 in regard to the signature of one of the attesting witnesses being proved in his handwriting. We see no reason to doubt the testimony. G As far as signature of the testator is concerned, apart from B7 and B13, the executor has spoken of the testator signing. Also, PW1 has deposed that the Will was shown to him he admitted that every page is contained with the paternal uncle signature. Thus, the requirement of proof of Will under Section 69 are fulfilled.

H

WHETHER RECEPTION OF B10 AS SECONDARY EVIDENCE LEGAL?

75. Whether the acceptance of B10 which is the certified copy of the Will is vulnerable in law or on facts. The Trial court has found that B68 is the original Will which was produced before the Magistrate in the proceedings under Section 145 of the CrPC This is after over-ruling the contention of the respondents that B68 was not the original Will. The Trial Court has found little merit in the objection against secondary evidence of the Will, viz., certified copy of the registered Will being produced. We have in fact evidence in the form of B7 and X1 to show that the Will came to be registered.

76. The original of the Will according to the case of the appellants continued to be with the executor who was in fact the nephew of R. Krishnammal, the widow of Rangaswami Naidu. An attempt was made to get the original Will produced at the relevant time when the executor had passed away, on the basis that his son was in possession of the original Will. He was called upon to produce the Will by C1. He responded by pointing out that he was not having the original Will with him. The finding of the Trial court as affirmed by the First Appellate Court is that circumstances warranted admission of secondary evidence to prove the Will. We see no reason to take a different view and the view taken by the High Court cannot be sustained.

77. It may be true that in the proceedings in O.S. No. 71 of 1958 and O.S. No. 36 of 1963, the Will was projected first by R. Krishnammal and thereafter, the plantiffs in O.S. No. 36 of 1963 who are among the appellants before us. However, the matter did not go to trial. We are also of the view that the Will must be proved under the Evidence Act and not with reference to plea of estoppel as taken by the appellants based on the decree in O.S. No. 36 of 1963, being based on the Will and the respondents having participated not as parties even to the compromise but it is a far cry from finding that the facts of the case did not warrant admission of secondary evidence regarding the Will.

THE WILL: WHETHER IT IS THE GENUINE WILL OF RANGASWAMI NAIDU? WHETHER IT IS VITIATED ON ANY GROUND?

78. We notice the following to be the relevant portions of the Will:

"Last Will and testament executed this 10th day of May 1995 by Sri V. Rangaswami Naidu MLC son of Endapillar Venkataswami Naidu of Uppilipalayam Coimbatore Waluk I own the immovable properties a set out in Sch.A hereto absolutely exclusively and in my own right. These properties include properties purchased by me and properties that has been allotted to me in the family partition between me and my brother Shri R.V. Lakashmaiah Naidu in 1932 and which are in my exclusive possession and enjoyment since that date I have been a divided member from 1932 onwards and have continued to be so till this date. I have also to avoid any uncertainties in this regard made an open declaration of my divided status today. Besides the immovable properties I am entitled to the cash and other amounts as set out in Sch.B hereto I fell that I should make a deposition of my assets in the manner herein indicated in view of my recent ill health and failing strength and also in view of my diffidenceth as I may not live long enough I am not in full possession of my mental powers and I am making this will and Testament after deep deliberation and consideration and with the best of intentions appoint Sri Ramachandra Baidu son of Kangallar Venkataswami Naidu of Metupalayam to be the executor under the will. I bequeath all my landed properties and my house set out in Sch.A to my wife for life. she has no powers of alienation but she is entitled to enjoy the income from the lands and also to manage them. It is my earnest wish that out of the income from the landed properties in my wife should meet the expenses of presents on ceremonial and special occasion in my sisters families after meeting her own family expenses maintenance of the house careto. After my wife's lifetime the properties V. Rangaswami, 2. ….. in Sch A shall belong equally and absolutely to the following persons who are my sisters sons 1. V. Kalyanasami Naidu, Son of my sister Thayammal 2. R. Soundararaj as son of my Third Sister Nagammal 3. A. Alagriswami Son of Ranga Nayakiammal my forth sister 4. R. Alagiriswami Son of Krishnammal my last sister. It is my earnest wish that these four person should keep the properties for their respective families and should not dispose them off, but in case of need they should sell them in the first instance to any of the other shares. The cash and other securities set out in Sch B valued at Rs.44,000/- (Rupees Forty Four thousand) should be realized as

early as possible after my death and shall be paid to the following person in the following manner 1. Srimathi Amirthim Wife of Sri Kalyanaswami afiresaid Rs.10,000.0.0, 2. Ammaniammal my second sister Rs.10,000.0.0 3. Nagammal my third sister Rs.8,000.0.0 4. Ranganayakiammal my forth sister Rs.8,000.0.0 5. Krishnammal my fifth and last sister Rs.8,000,0.0 I have already made some other provisions for my wife apart from the properties under the will. they are not effected in any manner by these provisions. She is entitled to the movable propertiies not covered by the schedules hereto. … V. Rangaswami, 3. … This is my lst will and Testament All previous dispositions and intended dispositions are hereby finally revoked. This will shall come into effect after my life time. …"

79. It will be seen from the Will that the Testator has recited in the Will that he owns the immovable properties set out in Schedule A exclusively and in his own right. The said properties are alleged to include properties purchased by him and properties allotted to him in his family partition between him and his brother in 1932. He further states that he has been a divided member from 1932 onwards and has continued to be so till the date of the Will. Finally, he states that, he, in order to avoid any uncertainties, made an open declaration of his divided status today. The Will further refers to amounts which he is entitled to as set out in Schedule B. Entire properties in Schedule A, including his house, is set out for his wife without powers of alienation. He further states that he expects his wife to make use of the income from the landed properties to be used to meet the expense of presents on ceremonial and special occasions in his sisters families after meeting her own family expense, maintenance of the house. There is a remainder, absolute in nature, given to his four Legatees, i.e., his Nephews through his four sisters. He expressed his earnest wish that the four Legatees should keep the properties for their respective families and should not dispose them off, but in case of need, they should sell them in the first instance to any of the other sharers. The last portion to be noted is the statement that he has already made other provisions for his wife apart from the properties under the Will.

80. There is one aspect which is pressed before us also, in regard to the same, by the respondents. It is contended that the fact that there is no oral partition between brothers in 1932, makes it out to be a case where the Testator has made a rank incorrect statement in the Will which shrouds the Will itself as one which is not genuine.

A 81. In regard to the aspect about incorrect statement in the will, it is to be noticed that making a totally incorrect statement in a will arouses suspicion. This is on the principle that the testator would not make an incorrect statement when he makes a will. If he makes a rank incorrect statement the inference is that he would not have made that will. This principle will not be applicable in the facts of this case. Making the B statement that there was a partition in 1932 and that the properties were allotted to him, is apparently the understanding of the testator. This issue generated debate in the courts. The view expressed by the testator did not find favour with the courts but that is a far cry from describing it as an outright false statement. As long as it is a part of the will which is C made by the testator and he believed in it the finding given by the court in this regard will not advance the case of the respondent.

82. We further notice the following aspects:

Rangaswami Naidu was an educated man. He was a former M.L.C.. He was an affluent man. He has no issues. He was affectionate D towards his sisters. He has chosen to favour each branch of his sisters by selecting one son out of each branch to be the legatees in whom the property were to vest. In fact, he has also provided that the properties are to remain in the family and should any of the legatees wish to sell, it should be offered to the other legatees. As far as his health is concerned, E it is well settled that the requirement of sound disposing capacity is not to be confused with physical well-being. A person who is having a physical ailment may not therefore berobbed of his sound disposing capacity. The fact that a person is afflicted with a physical illness or that he is in excruciating pain will not deprive him of his capacity to make a will. What is important is whether he is conscious of what he is doing and the F will reflects what he has chosen to decide. While it may be true that he was suffering from cancer of the throat there is nothing to indicate in the evidence that he was incapable of making up of his own mind in the matter in leaving a will behind. The fact that he was being fed by a tube could hardly have deprived him of his capacity to make a will. We further G notice that the will is a registered will. The Registrar came home. Exhibit X1 would show that Rangaswami Naidu on being asked to put his thumb impression, he insisted on signing. This course of conduct, in our view, has been correctly appreciated by the first appellate court, the final court on facts. The inference to the contrary sought to be drawn does not appeal to us. From the evidence, it is also clear that the other attesting H

witness was Dr. C.S. Ramaswamy Iyer a fairly renowned Physician and family friend. PW1, the witness on behalf of the respondent has himself admitted publishing the obituary on the passing away of the said doctor. PW1 speaks about him as a gentleman and he won't act illegal manner. In B7 the other attesting witness has also spoken about the doctor remaining there and no doubt leaving before the Registrar came. We have already held that the requirement of Section 69 of the Evidence Act stands fulfilled otherwise. The fact that no bequest is made in favour of the sons of Lakshmiah Naidu cannot be treated as a suspicious circumstance. It is clear that Lakshmiah Naidu was extremely wealthy. Making the nephew of his wife executor of the will, in fact, does assure us of the absence of any foul play on the part of the legatees. In his evidence [B13 which is the evidence given by the Executor in 145 proceedings], he has spoken about the testator expressing his desire on 2-3 occasions about wanting to executing a will. From the evidence adduced by PW1 also, we would think that the view taken by the first appellate court regarding the will cannot be characterized as a perverse one warranting interference in the second appeal.

83. Lastly, while the burden to prove the will and to satisfy the conscience of the court that there are no suspicious circumstances or if there are any to explain them is on the propounder of the will, the burden to prove that the will is procured by coercion, undue influence or fraud is on the respondents who have alleged the same. The evidence of PW1 would show that the respondents have failed to prove that the will is vitiated in this regard. Therefore, we would arrive at the conclusion that the will was indeed executed by R. Naidu and was his last will.

84. Undoubtedly, Rangaswami Naidu and Lakshmiah Naidu who were brothers, were co-parceners in a Hindu Coparcenary. The case of the appellants is based upon their being a severance of the Hindu Joint Family. The expression 'the Hindu Joint Family' is in the context of this case, to be understood as the coparcenary. The argument of the respondents representing the Lakshmiah Naidu branch on the other hand is that, when Rangaswami Naidu died on 01.06.1955 and when, therefore, succession to his estate opened, Lakshmiah Naidu succeeded to the estate of his brother as Rangaswami Naidu died issueless and, therefore, under the law as it stood on that date, Lakshmiah Naidu succeeded to the property by survivorship.

A 85. The case of the appellants is based, in fact, on their having been an oral partition between the two brothers in the year 1932. Three Courts have found no merit in this contention. In fact, the appellants also did not pursue this line of argument before us. On the other hand, the contention which is pressed before us is that when such succession opened to the estate of Rangaswami Naidu on 01.06.1955,Rangaswami B Naidu having published B1 notice dated 10.05.1955, a disruption of the joint family was effected and, therefore, Rangaswami Naidu died separate from his brother. Still furthermore, the appellants case is founded upon B10-Will executed and also got registered on 10.05.1955 by Rangaswami Naidu.

C INTEREST IN HINDU JOINT FAMILY; PARTITION; ITS IMPLICATIONS

86. In the light of these contentions, it is necessary to examine the concepts relating to Hindu Joint Family, the effect of its continuance, the manner in which, the joint family comes to an end and also the distinct D shades of meaning to the expression 'division of a joint family'. Also, we must consider the right of a Hindu in regard to making a Will and the limitation on the same.

87. In Appovier v. Rama Subba Aiyan and others[35], the Privy Council had occasion to consider these concepts. The appellants before E the Court, who were unsuccessful in all the three courts in India, contended that despite there been a division in a Hindu Joint Family, it was not still effective insofar as it had not culminated in a partition by metes and bounds. It was dealing with this question that the court held, *inter alia*, as follows:

F "1. This is an appeal brought from a decree of the Sudder Court at Madras, which affirmed the decree of the Zillah Court of Tinnevelly, which itself affirmed the original decree of the Sudder Ameen of that District. It is, therefore, an appeal from three decrees, unanimous in rejecting the claim of the Appellant. The G present appeal is founded upon an allegation that certain property (shares in which are claimed by the Appellant) continues the undivided property of the family of which the Appellant was a member, and which was originally an undivided family. The foundation of the defence to the Appellant's claim is an instrument,

H [35][1866] 11 M.I.A.75

which we will call, for the present purpose, a deed of division, dated the 22nd of March, 1834.

2. Certain principles, or alleged rules of law, have been strongly contended for by the Appellant. One of them is, that if there be a deed of division between the members of an undivided family, which speaks of a division having been agreed upon, to be thereafter made, of the property of that family, that deed is ineffectual to convert the undivided property into divided property until it has been completed by an actual partition by metes and bounds.

3. Their Lordships do not find that any such doctrine has been established; and the argument appears to their Lordships to proceed upon error in confounding the division of title with the division of the subject to which the title is applied.

4. According to the true notion of an undivided family in Hindoo law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent, and claim to take from the Collector or receiver of the rents, a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment by the members of an undivided family. But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with ; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided.

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12. Then, if there be a conversion of the joint tenancy of an undivided family into a tenancy in common of the members of that undivided family, the undivided family becomes a divided family

A with reference to the property that is the subject of that agreement, and that is a separation in interest and in right, although not immediately followed by a de facto actual division of the subject-matter. This may at any time be claimed by virtue of the separate right."

B (Emphasis supplied)

88. It is now apposite to notice the judgment of the Privy Council reported in Girja Bai v. Sadashiv Dhundiraj and others[36]. In the said case, one of the members of a Joint Mitakshara Hindu Family served a notice expressing his desire to get partitioned his one-third share. C Thereafter, he instituted the suit for partition. During the pendency of the suit, the plaintiff died survived by his widow. She moved for substitution. This was opposed by the defendants on the ground that at the time of his death, the plaintiff was an undivided member of a Joint Hindu Family and that on his death, his share passed to them by survivorship. This is despite the fact that earlier on, in the suit, the D defendants had admitted the plaintiffs claim and contended that they were willing to divide the estate and that the suit was premature. The court referred to the earlier judgement of the Privy Council reported in Pandit Suraj Narain and another v. Pandit Iqbal Narainand others[37]. It is relevant to notice what the court proceeded to lay down:

E "25. It appears to their Lordships that the Appellate Court has, in this case, confused the two considerations to which reference has been made above, viz., the severance of status which is a matter of individual volition, with the allotment of shares which may be effected by different methods : by private F agreement, by arbitrators appointed by the parties, or, in the last resort, by the Court."

After referring to the statements in Appovier(supra), the Court held as follows:

"28. Some of the Courts in India have supposed Lord G Westbury's expressions to imply that the severance of status can take place only by agreement. Their Lordships have no doubt that this is a mistaken view. The Board there was dealing with a case in which division of right had already taken place, as evidenced

[36]AIR 1916 PC 104

H [37](1912-13)40 IA 40 ; (1913) 11 All LJ 172

by the " deed of division." The right which each individual member had in this joint property did not spring from the deed or the agreement of the parties to which it gave expression; the agreement only recognised existing rights in each individual member which he was entitled to assert at any time he liked. 29. The intention to separate may be evinced in different ways, either by explicit declaration or by conduct."

89. Next, we must notice the judgment rendered by a Bench of three learned Judges of this Court reported in Addagada Raghavamma and another v. Addagada Chenchamma and another[38]. In the said case, the appellant before the Court was the widow of one Piechayya. The respondent in the case Chenchamma was the wife of one Venkayya who was, in fact, the son of the brother of Piechayya. In substance, the dispute revolved around the question whether there was a disruption in the Joint Hindu Family brought about prior to the execution of a will by the brother-in-law of the appellant. Subbarao was the son of Venkayya from the marriage with Chenchamma). Though there were two questions, we are only concerned with second question, viz., whether partition was brought about prior to the execution of the will and we may also notice the further question which arose which was whether a disruption was brought about by the terms of the will itself.

90. The Court proceeded to elaborately consider the evidence on record and came to the conclusion that the evidence did not support the contention of the appellant which was that in 1894, much before the will was executed in the year 1946, a partition has taken place. Thereafter, it is necessary to notice the following paragraphs in the opinion rendered by the court:

"25. Now we shall proceed to deal with the will, Ex. A-2 (a), on which strong reliance is placed by the learned Advocate-General in support of his contention that on January 14, 1945, that is, the date when the Will was executed, Chimpirayya must be deemed to have been divided in status from his grandson Subbarao. A will speaks only from the date of death of the testator. A member of an undivided coparcenary has the legal capacity to execute a will, but he cannot validly bequeath his undivided interest in the joint family property. If he died an undivided member of the family, his interest survives to the other members of the family, and,

[38]AIR 1964 SC 136

A therefore, the will cannot operate on the interest of the joint family property. But if he was separated from the family before his death, the bequest would take effect. So, the important question that arises is whether the testator in the present case became separated from the joint family before his death."

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27. The main question of law that arises is whether a member of a joint Hindu family becomes separated from the other members of the family by mere declaration of his unequivocal intention to divide from the family without bringing the same to the knowledge C of the other member of the family. In this context a reference to Hindu law texts would be appropriate, for they are the sources from which Courts evolved the doctrine by a pragmatic approach to problems that arose from time to time. The evolution of the doctrine can be studied in two parts, viz., (*1*) the declaration of the intention, and (*2*) communication of it to others affected thereby. D On the first part the following texts would throw considerable light. They are collated and translated by Viswanatha Sastri, J., who has a deed and abiding knowledge of the sources of Hindu lawin *Adiyalath Katheesumma* v. *Adiyalath Beechu* [ILR 1930 Mad 502] ; and we accept his translations as correct and indeed E learned counsel on both sides proceeded on that basis. *Yajnavalkya, Chapter II, Section 121*. "In land, corrody (annuity, etc.), or wealth received from the grandfather, the ownership of the father and the son is only equal". Vijnaneswara commenting on the said sloka says:

F "…And thus though the mother is having menstrual courses (has not lost the capacity to bear children) and the father has attachment and does not desire a partition, yet by the will (or desire) of the son a partition of the grandfather's wealth does take place." (*Setlur's Mitakshara*, pp. 646-48).

G *Saraswati Vilase, placitum 28*. "From this it is known that without any speech (or explanation) even by means of a determination (or resolution) only, partition is effected, just as an appointed daughter is constituted by mere intention without speech."

H *Viramitrodaya of Hitra Misra (Chapter II, Pl. 23)*.

"Here too there is no distinction between a partition during the lifetime of the father or after his death and partition at the desire of the sons may take place or even by the desire (or at the will of a single coparcener).

Vyavahara Mayukha of Nilakantabhatta: (Chapter IV, Section iii-I).

"Even in the absence of any common (joint family) property, severance does indeed result by the mere declaration "I am separate from thee" because severance is a particular state (or condition) of the mind and the declaration is merely a manifestation of this mental state (or condition)."

The Sanskrit expressions "sankalpa" (resolution) in Saraswati Vilas, "akechchaya" (will of single coparcener) in Viramitrodaya "budhivisesha" (particular state or condition of the mind) in Vyavahara Mayukha, bring out the idea that the severance of joint status is a matter of individual direction. The Hindu law texts, therefore, support the proposition that severance in status is brought about by unilateral exercise of discretion.

28. Though in the beginning there appeared to be a conflict of views, the later decisions correctly interpreted the Hindu law texts. This aspect has been considered and the law pertaining thereto precisely laid down by the Privy Council in a series of decisions: see *Suraj Narain* v. *Iqbal Narain* [(1912) ILR 35 All 80 (PC)] ; *Giria Bai* v. *Sadashiv Dhundiraj* [(1916) ILR 43 Cal 1031 (PC)] ; *Kawal Narain* v. *Budh Singh* [(1917) ILR 39 All 496 (PC)] ; and *Bamalinga Annavi* v. *Naravana Annavi* [(1922) ILR 45 Mad 489 (PC)] . In *Syed Kasam* v. *Jorawar Singh* [(1922) ILR 50 Cal 84 (PC)] the Judicial Committee, after reviewing its earlier decision laid the settled law on the subject thus:

"It is settled law that in the case of a joint Hindu family subject to the law of the Mitakshara, a severance of estate is effected by an unequivocal declaration on the part of one of the joint holders of his intention to hold his share separately, even though no actual division takes place…."

So far, therefore, the law is well settled, viz., that a severance in estate is a matter of individual discretion and that to bring about that state there should be an unambiguous declaration to that effect

A are propositions laid down by the Hindu law texts and sanctioned by authoritative decisions of Courts. But the difficult question is whether the knowledge of such a manifested intention on the part of the other affected members of the family is a necessary condition for constituting a division in status. Hindu law texts do not directly help us much in this regard, except that the pregnant expressions used therein suggest a line of thought which was pursued by Courts to evolve concepts to meet the requirements of a changing society. The following statement in Vyavahara Mayukha is helpful in this context:

> "...severance does indeed result by the mere declaration" 'I am separate from thee' because severance is a particular state (or condition) of the mind and the declaration is merely a manifestation of this mental state (or condition)."

One cannot declare or manifest his mental state in a vacuum. To declare is to make known, to assert to others. "Others" must necessarily be those affected by the said declaration. Therefore a member of a joint Hindu family seeking to separate himself from others will have to make known his intention to the other members of the family from whom he seeks to separate. The process of manifestation may vary with circumstances. This idea was expressed by learned Judges by adopting different terminology, but they presumably found it as implicit in the concept of declaration. Sadasiva Iyer, J., in *Soun-dararaian* v. *Arunachalam Chetty* [(1915) ILR 39 Mad 159 (PC)] said that the expression "clearly expressed" used by the Privy Council in *Suraj Narain* v. *Iqbal Narain* [(1912) ILR 35 All 80 (PC)] meant "clearly expressed to the definite knowledge of the other coparceners". In *Girja Bai* v. *Sadashive Dhundiraj* [(1916) ILR 43 Cal 1031 (PC)] the Judicial Committee observed that the manifested intention must be "clearly intimated" to the other coparceners. Sir George Lownles in *Bal Krishna* v. *Ram Ksishna* [(1931) ILR 53 All 300 (PC)] took it as settled law that a separation may be effected by clear and unequivocal declaration on the part of one member of a joint Hindu family to his coparceners of his desire to separate himself from the joint family. Sir John Wallis in *Babu Ramasray Prasad Choudhary* v. *Radhika Devi* [(1935) 43 LW 172 (PC)] again accepted as settled law the proposition that "a member of a joint

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Hindu family may effect a separation in status by giving a clear and unmistakable intimation by his acts or declaration of a fixed intention to become separate…." Sir John Wallis, C.J., and Kumaraswami Sastri, J. in *Kamepalli Avilamma* v. *Mannem Venkataswamy* [(1913) 33 MLJ (746)] were emphatic when they stated that if a coparcener did not communicate, during his life time, his intention to become divided to the other coparceners, the mere declaration of his intention, though expressed or manifested, did not effect a severance in status. These decisions authoritatively laid down the proposition that the knowledge of the members of the family of the manifested intention of one of them to separate from them is a necessary condition for bringing about that member's severance from the family. But it is said that two decisions of the Madras High Court registered a departure from the said rule. The first of them is the decision of Madhavan Nair, J. in *Rama Ayyar* v. *Meenakshi Ammal* [(1930) 33 LW 384] . There, the learned Judge held that severance of status related back to the date when the communication was sent. The learned Judge deduced this proposition from the accepted principle that the other coparceners had no choice or option in the matter. But the important circumstance in that case was that the testator lived till after the date of the service of the notice. If that was so, that decision on the facts was correct. We shall deal with the doctrine of relating back at a later stage. The second decision is that of a Division Bench of the Madras High Court, consisting of Varadachariar and King, JJ., in *Narayana Rao* v. *Purushotama Rao* [ILR 1938 Mad 315, 318] . There, a testator executed a will disposing of his share in the joint family property in favour of a stranger and died on August 5, 1926. The notice sent by the testator to his son on August 3, 1926 was in fact received by the latter on August 9, 1926. It was contended that the division in status was effected only on August 9, 1926, when the son received the notice and as the testator had died on August 5, 1926 and the estate had passed by survivorship to the son on that date the receipt of the notice on August 9, 1926 could not divest the son of the estate so vested in him and the will was, therefore, not valid. Varadachariar, J., delivering the judgment of the Bench observed thus:

"It is true that the authorities lay down generally that the communication of the intention to become divided to other

A coparceners is necessary, but none of them lays down that the severance in status does not take place till after such communication has been received by the other coparceners."

After pointing out the various anomalies that might arise in accepting the contention advanced before them, the learned Judge
B proceeded to state:

"It may be that if the law is authoritatively settled, it is not open to us to refuse to give effect to it merely on the ground that it may lead to anomalous consequences; but when the law has not been so stated in any decision of authority and such a view is
C not necessitated or justified by the reason of the rules, we see no reason to interpret the reference to 'communication' in the various cases as implying that the severance does not arise until notice has actually been received by the addressee or addressees."

We regret our inability to accept this view. Firstly, because, as we
D have pointed out earlier, the law has been well settled by the decisions of the Judicial Committee that the manifested intention should be made known to the other members of the family affected thereby; secondly, because there would be anomalies on the acceptation of either of the views. Thirdly, it is implicit in the doctrine of declaration of an intention that it should be declared to
E somebody and who can that somebody be except the one that is affected thereby.

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F 32. It is, therefore, clear that Hindu law texts suggested and Courts evolved, by a process of reasoning as well as by a pragmatic approach that, such a declaration to be effective should reach the person or person affected by one process or other appropriate to a given situation.

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34. The third question falls to be decided in this appeal. It is this: what is the date from which severance in status is deemed to have taken place? Is it the date of expression of intention or the date when it is brought to the knowledge of the other members?
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If it is the latter date, is it the date when one of the members first acquired knowledge or the date when the last of them acquired the said knowledge or the different dates on which each of the members of the family got knowledge of the intention so far as he is concerned? If the last alternative be accepted, the dividing member will be deemed to have been separated from each of the members on different dates. The acceptance of the said principle would inevitably lead to confusion. If the first alternative be accepted, it would be doing lip service to the doctrine of knowledge, for the member who gets knowledge of the intention first may in no sense of the term be a representative of the family. The second alternative may put off indefinitely the date of severance, as the whereabouts of one of the members may not be known at all or may be known after many years. The Hindu law texts do not provide any solution to meet these contingencies. The decided cases also do not suggest a way out. It is, therefore, open to this Court to evolve a reasonable and equitable solution without doing violence to the principles of Hindu law. The doctrine of relation back has already been recognized by Hindu law developed by courts and applied in that branch of the law pertaining to adoption. There are two ingredients of a declaration of a member's intention to separate. One is the expression of the intention and the other is bringing the expression to the knowledge of the person or persons affected. When once the knowledge is brought home — that depends upon the facts of each case — it relates back to the date when the intention is formed and expressed. But between the two dates, the person expressing the intention may lose his interest in the family property; he may withdraw his intention to divide; he may die before his intention to divide is conveyed to the other members of the family: with the result his interest survives to the other members. A manager of a joint Hindu family may sell away the entire family property for debts binding on the family. There may be similar other instances. If the doctrine of relation back is invoked without any limitation thereon, vested rights so created will be affected and settled titles may be disturbed. Principles of equity require and common sense demands that a limitation which avoids the confusion of titles must be placed on it. What would be more equitable and reasonable than to suggest that the doctrine should not affect vested rights? By imposing such a limitation we

A are not curtailing the scope of any well established Hindu law doctrine, but we are invoking only a principle by analogy subject to a limitation to meet a contingency. Further, the principle of retroactivity, unless a legislative intention is clearly to the contrary, saves vested rights. As the doctrine of relation back involves retroactivity by parity of reasoning, it cannot affect vested rights. It would follow that, though the date of severance is that of manifestation of the intention to separate the right accrued to others in the joint family property between the said manifestation and the knowledge of it by the other members would be saved.

C 35. Applying the said principles to the present case, it will have to be held that on the death of Chimpirayya his interest devolved on Subbarao and, therefore, his will, even if it could be relied upon for ascertaining his intention to separate from the family, could not convey his interest in the family property, as it has not been established that Subbarao or his guardian had knowledge of the contents of the said will before Chimpirayya died."

D

91. The Court also, in paragraph 37, expressed the view that it was not necessary to decide whether the will contained the necessary and unambiguous declaration of intention to divide himself from the family.

92. Next, in the line of decisions of this Court is the judgment E reported in Puttrangamma and others v. M.S. Ranganna and others[39]. The appeal arose from a suit for partition. One of the questions which arose was whether the plaintiff had died as a divided member of a joint family. In this context, the Court laid down as follows:

"5. It is now a settled doctrine of Hindu Law that a member F of a joint Hindu family can bring about his separation in status by a definite, unequivocal and unilateral declaration of his intention to separate himself from the family and enjoy his share in severalty. It is not necessary that there should be an agreement between all the coparceners for the disruption of the joint status. It is immaterial in such a case whether the other coparceners give their assent to G the separation or not. The jural basis of this doctrine has been expounded by the early writers of Hindu Law.

93. This Court allowed the appeal on the view it took, viz., that the plaintiff indeed had effected disruption in the joint family on the principles of law which have been articulated.

H [39]AIR 1968 SC 1018

94. Next, we must refer to the judgment of this Court in Krishnabai Bhritar Ganpatrao Deshmukh v. Appasaheb Tuljaramarao Nimbalkar and others[40]. The High Court in the said case, which was a suit for possession and mesne profit, took the view that it was not established that there was a partition effected in the year 1902 as was found by the Trial Court. This Court restored the judgment of the Trial Court and held as follows:

> "16. We will take Point No. 1 canvassed by Shri Bal. The primary question that falls to be considered is, whether in 1902 or shortly prior to it, there was a partition between the two brothers — Narayanarao and Ramachandrarao — in a manner known to law. In this connection, it is necessary, at the outset, to notice the fundamental principles of Hindu Law bearing on the point. The parties are admittedly governed by Mitakshara School of Hindu law. In an undivided Hindu family of Mitakshara concept, no member can say that he is the owner of one-half, one-third or one-fourth share in the family property, there being unity of ownership and commensality of enjoyment while the family remains undivided. Such unity and commensality are the essential attributes of the concept of joint family status. Cesser of this unity and commensality means cesser or severance of the joint family status, or, which under Hindu law, is "partition"; irrespective of whether it is accompanied or followed by a division of the properties by metes and bounds. Disruption of joint status, itself, as Lord Westbury put it in *Appovier* v. *Rama Subba Aiyan* [(1886) 11 MIA 75 : 2 SR 218 : 8 WRPC 1] , in effect, "covers both a division of right and division of property". Reiterating the same position, in *Girja Bai* v. *Sadashiv* [AIR 1916 PC 104 : (1916) 43 IA 151] , the Judicial Committee explained that division of the joint status, or partition implies "separation in interest and in right, although not immediately followed by a de facto actual division of the subject-matter. This may at any time, be claimed by virtue of the separate right".
>
> 17. The division of the joint status may be brought about by any adult member of the joint family by intimating, indicating or representing to the other members in clear and unambiguous terms,

[40](1979) 4 SCC 60

A his intention to separate and enjoy his share in the family property, in severality. Such intimation, indication or representation may take diverse forms. Sometimes it is evidenced by an explicit declaration (written or oral); sometimes it is manifested by conduct of the members of the family in dealing separately with the former family properties. Service of notice or institution of a suit by one member/ coparcener against the other members/coparceners for partition and separate possession may be sufficient to cause disruption of the joint status."

B

(Emphasis supplied)

C In *Kalyani(dead) by LRs v. Narayanan and others*[41], a Bench of three learned Judges, laid down as follows:-

"10. The next stage in the unfolding of the case is whether Ex. P-1 is effective as a partition. Partition is a word of technical import in Hindu law. Partition in one sense is a severance of joint status and coparcener of a coparcenary is entitled to claim it as a matter of his individual volition. In this narrow sense all that is necessary to constitute partition is a definite and unequivocal indication of his intention by a member of a joint family to separate himself from the family and enjoy his share in severalty. Such an unequivocal intention to separate brings about a disruption of joint family status, at any rate, in respect of separating member or members and thereby puts an end to the coparcenary with right of survivorship and such separated member holds from the time of disruption of joint family as tenant-in-common. Such partition has an impact on devolution of shares of such members. It goes to his heirs displacing survivorship. Such partition irrespective of whether it is accompanied or followed by division of properties by metes and bounds covers both a division of right and division of property (see *Appovier* v. *Rama Subba Aiyan* [(1886) 11 MIA 75 : 2 Sar 218 : 8 WR PC 1] quoted with approval in *Krishnabai Bhritar Ganpatrao Deshmukh* v. *Appasaheb Tuljaramarao Nimbalkar* [(1979) 4 SCC 60, 68]). A disruption of joint family status by a definite and unequivocal indication to separate implies separation in interest and in right, although not immediately followed by a de facto actual division of the subject-matter. This may at any time, be claimed by virtue of the separate right (see *Girja*

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H [41]AIR 1980 SC 1173

Bai v. *Sadashiv* [AIR 1916 PC 104 : 43 IA 151 : 18 Bom LR 621]). A physical and actual division of property by metes and bounds follows from disruption of status and would be termed partition in a broader sense." A

We may notice paragraph 18 also which reads as follows:-

18. One thing is crystal clear that Ex. P-1 is not a deed of partition in the sense it does not purport to divide the property amongst various coparceners by metes and bounds. However, in Hindu law qua joint family and joint family property the word "partition" is understood in a special sense. If severance of joint status is brought about by a deed, a writing or an unequivocal declaration of intention to bring about such disruption, qua the joint family, it constitutes partition (see *Raghavamma* v. *Chenchamma* [AIR 1964 SC 136 : (1964) 2 SCR 933 : (1964) 1 SCA 593]). To constitute a partition all that is necessary is a definite and unequivocal indication of intention by a member of a joint family to separate himself from the family. What form such intimation, indication or representation of such interest should take would depend upon the circumstances of each case. A further requirement is that this unequivocal indication of intention to separate must be to the knowledge of the persons affected by such declaration. A review of the decisions shows that this intention to separate may be manifested in diverse ways. It may be by notice or by filing a suit. Undoubtedly, indication or intimation must be to members of the joint family likely to be affected by such a declaration." B C D E

This Court in Bhagwant P. Sulakhe v. Digambar Gopal Sulakhe and others (supra) held as under: F

"14……The character of any joint family property does not change with the severance of the status of the joint family and a joint family property continues to retain its joint family character so long as the joint family property is in existence and is not partitioned amongst the co-sharers. By a unilateral act it is not open to any member of the joint family to convert any joint family property into his personal property." G

IS THERE CONFLICT BETWEEN KALYANI (DEAD) BY LRS V. NARAYANAN AND OTHERS [AIR 1980 SC 1173] AND H

A BHAGWANT P. SULAKHE V. DIGAMBAR GOPAL SULAKHE AND OTHERS [AIR 1986 SC 79]

95. In Kalyani (supra), one Karappan who had two wives and children through them was governed in the matter of inheritance and succession essentially by customary law and in the absence of any specified custom, he was governed by the Hindu Mitakshara Law. He had executed a registered deed P1 which was variously described as a Will or as a deed of partition or evidencing a family arrangement. The Suit from which the case arose was filed by the Widow of one of his sons from his first wife. This Court went on to find that P1 could not be supported as Will insofar as Karappan had no power to devise by Will ancestral property. The Court further went on to consider whether B1 was effective as a partition. It was in this context that the observations in paragraph-10 of the judgment came to be made. The Court, after making the observations in paragraph-10, found that there was no effective partition by metes and bounds by B1 though the shares of sons were specified as also the provisions for the female members were made. Thereafter it is that the Court posed the question that if B1 is not effective as a Deed of Partition, its effect on the continued Joint Family status had to be examined. It is thereafter that when the court went on to make the observations in para 18 which we have set out. The Court further proceeded to find that by specifying of the share in Exhibit P1 there was first a disruption in the joint family by specifying the shares. Once a disruption took place, it was held, in a joint family status, the coparceners ceased to hold the property as joint tenants but they held as tenants in common. It was further the view of the court that the fact that the coparceners continued to stay under the same roof or enjoy the properties without division by metes and bound, did not matter. They did not hold as joint tenants unless reunion was pleaded and established. We are, in this case, also called upon to reconcile what has been laid down in this case with what has been laid down in a later Judgment in. The later decision Bhagwant P. Sulakhe (supra)was also rendered by a bench of three learned Judges.

96. We may briefly notice the facts involved in the said case. The appellant, who was the plaintiff in the Suit along with the Second Defendant therein and two of his brothers, were members of a Joint Hindu Family. There was a public limited company and also a firm. The appellant had acted as a Managing Agent. He had also acted as a

Managing Director of the Company. In regard to the same, he had earned remuneration. The question which essentially arose before this Court was whether it was to be treated as the personal income of the appellant or whether it belonged to the joint family. After considering the partnership deed and other materials, the Court, *inter alia*, observed as follows:

> "14 …The character of any joint family property does not change with the severance of the status of the joint family and a joint family property continues to retain its joint family character so long as the joint family property is in existence and is not partitioned amongst the co-sharers. By a unilateral act it is not open to any member of the joint family to convert any joint family property into his personal property."

97. The Trial Court, in this case, has laid store by the observations of this Court to the effect that as long as joint family property is in existence and is not in partitioned, the character of the joint family property does not change. It concluded that even if division is brought about by issuance of B1, the properties of the joint family consisting of V. Rangaswami Naidu and his brother remained joint and it could not be arrogated by V. Rangaswami Naidu as his and they bequeathed, as done. The first appellate court distinguished the decision by stating that it turned on in facts.

98. We would think that there is really no conflict as such. We have already noticed what has already been laid down by the Privy Council in Appovier (supra). The Court has laid down, *inter alia*, that when members of the Hindu Undivided Family agree among themselves that a particular property shall be thereafter be subject of ownership in certain defined shares, then, the character of the undivided property and joint enjoyment is taken away from it and each member will thereafter have a definite and certain share, even though the property itself has not been severed and divided.

99. It must be remembered that the said case actually involved an Undivided Hindu Joint Family wherein there was a deed of division and the contention, which had to be considered by the Court, was that, it was ineffectual to convert the undivided property into divided property until it had been completed by an actual partition by metes and bounds. The Court was essentially not considering the effect of a declaration by a coparcener to separate causing a division in a joint family status. The

A Court was also not considering the question as to whether, on such division in status, the rights of the coparcener, over specific items of properties, will be transformed into exclusive and absolute rights even without an agreement or partition, by metes and bounds.

100. In Girja Bai v. Sadashiv Dhundiraj[42], the Privy Council was
B dealing with a situation where the appellant's husband had served a registered notice on the Manager of a Mitakshara Joint Family expressing his desire to get partition and which was followed-up by a Suit for partition. We have noticed paragraph 25 and 28 therein.

101. Therefore, on a conspectus of the discussion we would hold
C as follows:

Partition has two shades of meaning in Hindu Law we are dealing with. In the one sense, partition is the first step which would ordinarily culminate in a metes and bounds partition. In a coparcenary, there is joint tenancy. A Hindu Coparcenary, which cannot be created by
D agreement between parties but is the creation of law, can be disrupted or a division is caused by a unilateral declaration by a coparcener to put an end to the joint family. What the coparcener has before the division is produced, is an interest, as has been referred to in both Sections 6 and 30 of the Hindu Succession Act. Upon a declaration being made, expressing intent to separate without anything more but no doubt on
E communication of the same to the other coparcener/coparceners, partition in the above sense viz. causing a division of title takes place. As already noticed, the partition in the aforesaid sense has far-reaching consequences. The joint tenancy, which includes the concept of Right to Inherit by Survivorship, is terminated with the partition being effected in
F the first sense. If the coparcener dies after causing such a partition, as the right on the basis of Doctrine of Survivorship is annihilated, his death, after such partition, would result in his heirs becoming entitled to succeed. In that sense, joint tenancy would be replaced by tenancy in common but that is not the same as saying that the properties of the family, where there has been a partition in the first sense, will without anything more
G stand transformed into the separate and exclusive properties of the divided members. This is the view, which is taken by this Court in Bhagwant P. Sulakhe. We are unable to subscribe to the view taken by the First Appellate Court that the principles of law, which are contained in

H [42]AIR 1916 PC 104

paragraph-14 of the Judgment, as extracted by us, are merely to be understood in the special facts of the said case. Partition, in a broader sense and as is commonly understood, is the division of the properties in accord with the shares.

WHETHER A HINDU COULD MAKE A WILL?

WHAT WERE THE LIMITS ON HIS POWER TO EXECUTE A WILL? ARE THERE ANY CHANGES BROUGHT ABOUT BY ENACTING SECTION 30 OF THE HINDU SUCCESSION ACT, 1956?

102. It would appear that the treatises in Hindu Law do not contain reference to the concept of a will. However, over a period of time, courts have recognised the powers for a Hindu to make a will. We are concerned in this case with Mitakshara Law. Thereunder, a Hindu could bequeath his separate and self-acquired properties even prior to the Hindu Succession Act being enacted. A Hindu being a member of the joint family could also possess his separate property which are of various kinds. They include obstructed heritage which is property inherited by a Hindu from another who is a person other than his father, father's father or great grandfather, Government grant, income of separate property, all acquisitions by means of learning (declared by Hindu Gains of Learning 1930) See in this regard para 228 of Mulla on Hindu Law 23rd edition page 341-342. As far as the law governing the making of the will is concerned there was no particular law which governed the same. It is in the year 1865 that the Succession Act came to be passed. It was not applicable to Hindus. The Hindu Wills Act 1870 which had limited application (it applied inter alia to Wills by Hindus in the town of Madras) no doubt made certain provisions of the Indian Succession Act of 1865 applicable to Hindus. Under the Probate and Administration Act, 1881 the executor, subject to law relating to survivorship was the legal representative of a Hindu. Section 211 of the Indian Succession Act, 1925 continues the same legal position. However, the Indian Succession Act of 1925 which repealed the earlier Succession Act has through Section 57 made the provisions of Part VI which are set out in schedule III to the Act applicable to all wills and codicils made by any Hindu, Buddhist, Sikh or Jain made on or after the 1st January 1927 to which those provisions are not applied under the preceding clauses viz. clauses (a) and (b) Section 57. It is thus that after 1st of January, 1927 in the matter of an unprivileged will executed by a Hindu, the requirement of Section

63 which includes attestation of such a will by a minimum of two witnesses became mandatory. Thus, the execution of a will by a Hindu also came to be regulated from the 1st of January, 1927.

103. Section 30 of the Hindu Succession Act reads as follows:

> "30. Testamentary succession. — Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him or by her], in accordance with the provisions of the Indian Succession Act, 1925 (39 of 1925), or any other law for the time being in force and applicable to Hindus. Explanation.— The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member of a tarwad, tavazhi, illom, kutumba or kavaru in the property of the tarwad, tavazhi, illom, kutumba or kavaru shall notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this section".

104. Does it bring about a change in law relating to power of a Hindu to execute a will? As noticed earlier even prior to Hindu Succession Act, a Hindu could execute a will bequeathing his separate and self-acquired property. As regards his authority to execute a will concerning his interest in the property of the joint family of which he is a coparcener, the law did not permit such an exercise. We may refer to the judgment of this Court in M.N. Aryamurthy v. M.D. Subbaraya Setty[43]; wherein this Court held as follows:

> "..But unfortunately, Lachiah, though a father, could not, under the Hindu Law, dispose of, by will, joint family property or any part thereof and as a will it was clearly inoperative on the various dispositions made by him (See *Parvatibai v. Bhagwant Pandharinath:* 39 Bom 593: AIR 1915 Bom 265 and *Subbarami Reddi v. Ramamma;* 43 Mad 824: AIR 1920 Mad 637). This latter case has questioned the correctness of a previous decision of that Court in *Appan Patra Chariar v. V.S. Srinivasa Charriar and Others;* 40 Mad 1122: AIR 1918 Mad 531. The decisions proceed on the principle which was well-settled in *Vital Putten v. Yamenamma;* (1874) 8 MHCR 6 and *Lakshman Dada Naik v. Ramachandra Dada Nair;* 5 Bom 48 (PC): 7 IA 181, that a co-

[43] 1972(4) SCC 7

parcener cannot devise joint family property by will, because, on the date of his death when the will takes effect, there is nothing for the will to operate on, as, at the moment of his death, his interest passes by survivorship to the other coparceners."

105. In *Villiammai Achi v. Nagappa Chettiar and another*[44], this Court, *inter alia*, held:

"10. … The property being joint family property Pallaniappa's father was not entitled to will it away and his making a will would make no difference to the nature of the property when it came into the hands of Pallaniappa. A father cannot turn joint family property into absolute property of his son by merely making a will, thus depriving sons of the son who might be born thereafter of their right in the joint family property. It is well settled that the share which a co-sharer obtains on partition of ancestral property is ancestral property as regards his male issues. They take an interest in it by birth whether they are in existence at the time of partition or are born subsequently: [see *Hindu Law* by Mulla, 13th Edn., p. 249, para 223(2)(4)]. If that is so and the character of the ancestral property does not change so far as sons are concerned even after partition, we fail to see how that character can change merely because the father makes a will by which he gives the residue of the joint family property (after making certain bequests) to the son. A father in a Mitakshara family has a very limited right to make a will and Pallaniappa's father could not make the will disposing of the entire joint family property, though he gave the residue to his son. We are therefore of opinion that merely because Pallaniappa's father made the will and Pallaniappa probably as a dutiful son took out probate and carried out the wishes of his father, the nature of the property could not change and it will be joint family property in the hands of Pallaniappa so far as his male issues are concerned."

106. As to whether Section 30 of the Hindu Succession Act brings about the radical departure of the power of a Hindu in the matter of making Will, we may refer to the decision of full Bench of the Mysore High Court in *Sundara Adapa v. Girija*[45]. Justice K.S. Hegde as his Lordship then was speaking for the Bench held:-

[44] AIR 1967 SC 1153
[45] AIR 1962 (Mysore) 72

A "15. It is well known that till the "Act" came into force, the interest of a coparcener in a Hindu joint family, be it a Mitakshara family or an Aliyasantana family, could not be disposed of by means of a testament, as by the time his will took effect his interest in the undivided family would have been taken by survivorship by the other coparceners. The Indian Succession Act did not make any inroad into that position. The relevant provisions of the Indian Succession Act are found in Part VI (Provisions relating to testamentary succession) read with the rules found in Schedule III. But they are also subject to the restrictions and modifications specified in that schedule. Restriction No. 1 in Schedule III says:—

"Nothing therein contained shall authorise a testator to bequeath property which he could not have alienated inter vivos, or to deprive any persons of any right of maintenance of which, but for the application of this section, he could not deprive them by will."

17. Neither under the customary law nor under the Aliyasantana Act nor under the Indian Succession Act the interest of a coparcener in an Aliyasantana Kutumba could have been disposed of by testamentary disposition. In that regard a definite change in the law was made by means of the Explanation to Sec. 30(1) of the "Act". There is no dispute that at present a member of an undivided Aliyasantana kutumba could dispose of his interest in the kutumba properties by means of a will. But we are unable to agree with Srli G.K. Govind Bhat when he says that Explanation to Sec. 30(1) enlarged the rights of a divided coparcener. The object of Section 30 is clear. That section neither directly nor by necessary Implication deals with the devolution of divided interest. As mentioned earlier, its purpose is limited. The language employed is plain and therefore no question of interpretation arises. It is not correct to contend, a, done by Sri Bhat, that it the Explanation to S. 30(1) is understood in the manner the respondents want us to understand, a coparcener who dies undivided would leave a more valuable estate to his heirs than one who dies divided. In most cases, the share taken by a nissanthathi kavaru though limited to the duration of the life of kavaru would be larger in extent than one unprovided under Sec. 7(2) of the "Act".

We find that this Court in *Jalaja Shedthi & Ors. v. Lakshmi Shedthi & Ors.;* 1973(2) SCC 773 has approved of view taken by the

High court in the aforesaid case. In other words, as we have already noted in the case of property of the joint family as long as the property is joint, the right of the coparcener can be described as an interest. The reason why we are saying this is as long as the family remains joint, a coparcener or even a person who is entitled to share when there is a partition cannot predicate or describe his right in terms of his share. The share remains shrouded and emerges only with division in title or status in the joint family. Once there is a division the share of a coparcener is laid bare. In this regard we may notice the judgment of this Court in *Hardeo Rai v. Sakuntala Devi and others*[46] in paragraphs 22 and 23. It reads as under:

> "22. For the purpose of assigning one's interest in the property, it was not necessary that partition by metes and bounds amongst the coparceners must take place. When an intention is expressed to partition the coparcenary property, the share of each of the coparceners becomes clear and ascertainable. Once the share of a coparcener is determined, it ceases to be a coparcenary property. The parties in such an event would not possess the property as "joint tenants" but as "tenants-in-common". The decision of this Court in *SBI* [(1969) 2 SCC 33 : AIR 1969 SC 1330] , therefore, is not applicable to the present case.
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> 23. Where a coparcener takes definite share in the property, he is owner of that share and as such he can alienate the same by sale or mortgage in the same manner as he can dispose of his separate property."

It is important to notice that what this Court has laid down that he becomes owner of "that share" and he can alienate 'the same'. It is different from saying that he is owner of the property in the sense of being the exclusive owner.

[See also in this regard the law as laid down in *Appovier case* (supra) in para 4 thereof].

107. We may also notice that even under the law prior to Hindu Succession Act there could be four situations. In regard to a member of a joint Hindu family who also has his separate property he could bequeath his separate property. As far as joint family property is concerned, there could be three situations. The first situation is where the family remains

[46]2008 (7) SCC 46

A joint in which case the coparcener would have an interest. As far as this interest is concerned, it could not be the subject matter of the will prior to the Hindu Succession Act. The second situation is in a case where there is a disruption in title or a division in status. What we mean is there is a partition in the sense of a division in the joint family status caused by any unequivocal declaration by a coparcener which is communicated. B It can be by words. It can be by conduct. It can also embrace the very filing of a suit for partition. When such disruption takes place then the share of the coparcener in the joint family property becomes a reality and takes concrete shape in accordance with law and the rights of the members of the family. As already noticed, this may or may not be C accompanied simultaneously with a metes and bounds partition. In such a scenario under the law prior to the Hindu Succession Act, having achieved disruption in the joint family, the right based on the principle of survivorship perishes. The share of the coparcener becomes undeniable. Should he die intestate the share would go not to the other coparceners by survivorship but to his heirs. It also opens the door to the coparcener D to exercise his right to bequeath his share in accordance with his wishes. This power was certainly available to a Hindu even prior to Section 30 of the Hindu Succession Act. The third scenario would be a situation where following a division in title or status in the family there is also a metes and bounds partition of the properties of the family in accordance E with the share. It cannot be open to doubt that in fact, capacity of a Hindu to bequeath such property existed even prior to the Hindu Succession Act. In fact, the property obtained as a share on a partition by a coparcener who has no male issues is treated as his separate property. As regards the effect of a son born after partition we need not pronounce on the same. After the amendment to the Succession Act F 2005 including the daughters of a coparcener as coparceners in their own right, if a Hindu has a female issue then the property allotted to him on partition will partake of the nature of coparcenary property. See in this regard the following discussion in para 228 clause (6) at page 342 in "Mulla on Hindu Law": 23rd Edition: Cataloguing different kinds of G separate property:-

> "(6) *Share on partition* – Property obtained as his share on partition by a coparcener who has no male issue (see S. 221(4)). This position is now materially altered with the inclusion of daughters of a coparcener as coparceners in their own right by H the amendment in the Hindu Succession Act 2005. If therefore,

even if a coparcener who has obtained a share on partition has no male issue but has a female issue, the property allotted to him on partition will partake the nature of coparcenary property. The above proposition will therefore have to be read as a coparcener having been allotted a share on partition, takes it as his separate property when he has no issue. This is since, by virtue of the amendment, as the distinction between male and female children of a coparcener stands abrogated and abolished, both having been given equality of status as coparceners."

After the passage of the Hindu Succession Act even without there being a partition in the sense of a declaration communicated by one coparcener to another to bring about the division it is open to a Hindu to bequeath his interest in the joint family. In other words, the words "interest in coparcenary property" can be predicated only when there is a joint family which is intact in status and not when there is a partition in the sense of there being a disruption in status in the family. Thus, the right of a Hindu in the coparcenary joint family is an interest. Upon disruption or division, it assumes the form of a definite share. When there is a metes and bounds partition then the share translates into absolute rights qua specific properties.

THE IMPACT OF THE HINDU WOMENS RIGHT TO PROPERTY ACT, 1937 (XVIII OF 1937)(HEREINAFTER REFERRED TO AS 'THE 1937 ACT', FOR SHORT).

108. It is apposite to notice Sections 2, 3 and 5 of the 1937 Act:

"2. Application. -Notwithstanding any rule of Hindu law or custom to the contrary, the provisions of section 3 shall apply where a Hindu dies intestate.

3. Devolution of property. -

(1) When a Hindu governed by the Dayabhaga School of Hindu Law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu law or by customary law dies intestate leaving separate property, his widow, or if there is more than one widow, all his widows together, shall, subject to the provisions of sub-section (3), be entitled in respect of property in respect of which he dies intestate to the same share as a son: Provided that the widow of a predeceased son shall inherit in like manner as a son if there is no son surviving

A of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such predeceased son: Provided further that the same provision shall apply mutatis mutandis to the widow of a predeceased son of a predeceased son.

B (2) When a Hindu governed by any school of Hindu law other than the Dayabhaga school or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had.

C (3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner.

(4) The provisions of this section shall not apply to an estate which by a customary or other rule of succession or by the terms of the grant applicable thereto descends to a single heir or to any property to which the Indian Succession Act, 1925, applies.

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E 5. Meaning of expression "die intestate". -For the purpose of this Act a person shall be deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect."

As can be seen, Section 3 of the 1937 Act applies when a Hindu F dies intestate.

It is important to notice that Section 3(1) of the 1937 Act deals with the case of the Hindu dying intestate leaving behind separate property. In such a situation, should there be one widow, she became entitled in respect of the property to the same share as the son. This was G made subject to sub-Section (3) which declares that, the interest devolving on her, would be a limited interest known as Hindu Woman's Estate. The more important change that was brought about is located in Section 3(2). Thereunder, when a Hindu governed by any School of Law, other than Dayabagha or Customary Law, dies, leaving behind at the time of his death, an interest in a Hindu Joint Family property, his H

widow is conferred the same interest as her husband had. This is again made subject to the provision of sub-Section (3) which makes it a limited interest known as the Hindu Woman's Estate. It will be, at once, noticed that the Legislature had not used the words "dies intestate" in Section 3(2), whereas, in Section 3(1), the Legislature contemplated a situation, where a Hindu could bequeath his separate property and has taken care to provide only for a contingency where he died intestate. No doubt Section 2 proclaimed that Section 3 was to be applied when a Hindu died intestate. When it comes to Section 3(2), in regard to a case covered by Mitakshara law, the Legislature has, in keeping with the law as then prevailing, recognised that a Hindu could not execute a Will in regard to his interest in a Hindu Joint Family. It is this concept, which has been swept away by enacting the E*xplanation* to Section 30 of the Hindu Succession Act, whereunder, it is open to a Hindu to even bequeath his interest in the Hindu Joint Family property. Coming back to Section 3(2) of the Hindu Women's Right to Property Act, the Legislature has advisedly chosen the words "interest in the Hindu Joint Family property", which may be contrasted with the provisions under Section 3(1), which contemplates the Hindu leaving behind separate property. Therefore, Section 3(2) contemplates the situation, where, at the time when the Hindu dies after the enactment of the Act in 1937 (it came into force on 14th April, 1937 and it was repealed by Section 31 of the Hindu Succession Act 1956), in order that the widow acquires the same interest as her husband had under Section 3(2), the Hindu must die when he is not separated from the joint property. If a Hindu, when he dies, is separated and, at least, *qua* him, there is no Hindu Joint Family, it would not be a case where Section 3(2) would apply. It is to be noted that, a Hindu when he dies intestate he may have an interest in a Hindu joint family and at the same time also have separate properties. Then qua his separate properties, Section 3(1) would apply whereas in regard to his interest in the joint family, Section 3(2) would govern. Section 3(1) cannot apply as the properties in dispute were not his separate properties.

What is the impact of this enactment on the claim for survivorship made by the Lakshmiah Naidu, the brother of V. Rangaswami Naidu? Did the Right by Survivorship, survive the passing of the 1937 Act? What is the nature of the Right, which is granted under Section 3(2) of the 1937 Act to a Hindu Widow? These questions have fallen for consideration before the Courts.

A We need only refer to one judgment, i.e., *Satrughan Isser v. Sabujpari and others*[47]. To quote:

> "7. By the Act certain antithetical concepts are sought to be reconciled. A widow of a coparcener is invested by the Act with the same interest which her husband had at the time of his
B death in the property of the coparcenary. She is thereby introduced into the coparcenary, and between the surviving coparceners of her husband and the widow so introduced, there arises community of interest and unity of possession. But the widow does not on that account become a coparcener: though invested with the same interest which her husband had in the property she does not acquire
C the right which her husband could have exercised over the interest of the other coparceners. Because of statutory substitution of her interest in the coparcenary property in place of her husband, the right which the other coparceners had under the Hindu law of the *Mitakshara* school of taking that interest by the rule of
D survivorship remains suspended so long as that estate enures. But on the death of a coparcener there is no dissolution of the coparcenary so as to carve out a defined interest in favour of the widow in the coparcenary property: *Lakshmi Perumallu* v. *Krishnavanamma* [AIR (1965) SC 825]. The interest acquired by her under Section 3(2) is subject to the restrictions on alienation
E which are inherent in her estate. She has still power to make her interest definite by making a demand for partition, is a male owner may. If the widow after being introduced into family to which her husband belonged does not seek partition, on the termination of her estate her interest will merge into the coparcenary property.
F But if she claims partition, she is severed from the other members and her interest becomes a defined interest in the coparcenary property, and the right of the other coparceners to take that interest by survivorship will stand extinguished. If she dies after partition on her estate is otherwise determined, the interest in coparcenary
G property which has vested in her will devolve upon the heirs of her husband. It is true that a widow obtaining an interest in coparcenary property by Section 3(2) does not inherit that interest but once her interest has ceased to have the character of undivided interest in the property, it will upon termination of her estate devolve

H [47]AIR 1967 SC 272

upon her husband's heirs. To assume as has been done in some decided cases that the right of the coparceners to take her interest on determination of the widow's interest survives even after the interest has become definite, because of a claim for partition, is to denude the right to claim partition of all reality." A

The position at law may therefore, may be culled out as follows: B

With the passing of the 1937 Act, in areas to which it applied, an intrusion was indeed made upon a coparceners right to set-up a claim to the property of a deceased coparcener based on the Doctrine of Survivorship but the Act did not annhilate the said Right. The Right to claim by Survivorship came to be suspended but not extinguished. The widow, though not a coparcener, was like a coparcener in most respects. She was also conferred with the right to claim partition. As long as she did not claim partition and the property remained intact upon her death, the Right to Claim by Survivorship which stood eclipsed, revived and the coparceners would become entitled to the property on the basis that succession opened as if the coparcener died when the widow died. On the other hand, if the widow claimed partition, her interest transformed into a defined interest and the Right to Claim by Survivorship, which stood suspended, was destroyed. The property would then enure to the heirs of the husband. It is also to be noted that, by virtue of Section 3(2), there is no rupture in the coparcenary. There is no division brought about by Section 3 (2) of the 1937 Act, in other words. C D E

We must also not be oblivious to two developments which took place after succession opened to the estate of V. Rangaswami Naidu on 01.06.1955. The Hindu Succession Act, 1956 containing Section 14 came to be passed, the effect of which will be discussed later. Secondly, we may also notice that R. Krishnammal the widow, filed O.S. No. 71 of 1958 wherein as an alternate prayer, she sought partition. We have already noticed the principle which has been laid down about the effect of a demand for partition by a widow in whom the Right came to be vested under Section 3(2) of the 1937 Act. But, as we have noticed, the supervening Legislation in the form of the Hindu Succession Act, if it did confer absolute rights under Section 14(1), it is a matter of law as to what was the nature of the Right R. Krishnammal possessed, F G H

A even when she instituted O.S. No. 71 of 1958. It is clear that when succession opened to the estate on 1.6.1955 if Section 3(2) applied, then Lakshmiah Naidu would have only a suspended right of survivorship. There is the compromise decree in OS 71 of 1958 under which R. Krishnammal has given up all her rights in the plaint schedule properties in favour of the Lakshmiah branch.

B

109. We find legislative recognition of this concept of 'interest' in joint family in Section 6 of the Hindu Succession Act. Section 6 prior to its substitution by Amending Act 39 of 2005 provided that in the case of male Hindu dying after the Act possessing an interest in Mitakshara coparcenary property, the property was to devolve by survivorship, subject

C to the proviso. What is of greater relevance is the terms of explanation. The terms of the explanation I as it stood which is retained as the explanation in sub-section (3) of Section 6 after the amendment reads as follows:

D

> Explanation. —For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

E

110. Therefore, the concept that what a coparcener in a Mitakshara family had prior to partition, is an interest, is reiterated. For the purpose of Section 6, however, in order to determine the extent of that interest it is deemed to be the share which he would get if there was a notional partition just prior to his death. Partition in the sense of a

F disruption however determines the extent of share which would devolve under Section 8 of the Act. We make it clear that we must not be treated as having pronounced that the notional partition contemplated under the explanation to Section 6 is meant to bring about the demise of the coparcenary as such. The Explanation to Section (30) also speaks of 'interest' as being 'property' which a Hindu could after the Hindu

G Succession Act bequeath.

WHAT IS TITLE OF V. RANGASWAMI NAIDU, WHICH HE COULD PASS?

111. O.S. No. 89 of 1983 is a Suit where there is a declaration of

H the plaintiff's right sought and also a Decree of Partition. The cause of

action is based on the remainder right traced from the terms of the Will dated 10.05.1955. It is apposite to bear in mind one aspect. In a proceeding instituted to obtain probate of a Will, if a contention is raised about the title of the Testator, it would be foreign to the scope of the inquiry to enquire into the title of the Testator. The court, considering the grant or refusal of the probate is only to deal with the question as to whether the Will was the last and genuine Will executed by the Testator. Questions relating to title would have to be pursued before the appropriate Forum (See Kanwarjit Singh Dhillon v. Hardyal Singh Dhillon[48]). Would that be the position in the case of the title Suit wherein a plaintiff invites the court to pass a Decree for partition and *qua* the partition suit, Defendants 1 to 3 who are among the appellants before us, would stand in the shoes of a plaintiff. We would think that O.S. No. 89 of 1983 and even O.S. No. 649 of 1985, are Suits based on title. The question relating to the right to the property involved must be gone into and decided.

112. We have already found that in the claim that V. Rangawami Naidu acquired title to the properties by way of oral partition, cannot be accepted. The claim that he had acquired properties by way of self-acquisition, also may not stand. If there has been a disruption in the family status, partition in the narrow sense of a division in title takes place. We have also found that the mere fact that there is a division effected in the joint family, would not mean that, in law, V. Rangaswami Naidu could claim exclusive and absolute ownership *qua* the items covered under the Will. The plaint schedule properties are, admittedly, part of the properties scheduled to the Will. The result would be that, in terms of the legal principles applicable, we would find that V. Rangaswami Naidu did not have exclusive right as such *qua* the properties scheduled under the Will.

113. However, the reasoning of the First Appellate Court may be noticed in this regard. After finding that a co-owner cannot unilaterally allot specific properties to his share, the Appellate Court took the following aspects into consideration:

> The respondents (plaintiffs in O.S. No. 649 of 1985) were aware in the earlier litigation (O.S. No. 71 of 1958 and O.S. No. 36 of 1963) that V. Rangaswami Naidu had made unilateral allotment, and even though they had got opportunity in the above

[48](2007) 1 SCC 357

two instances, they did not raise any objection over the unilateral allotment. Next, the Appellate Court took note of the fact that there were more than ninety-three items of properties of more than hundreds acres of land of Hindu Joint Family consisting of the brothers, and therefore, the allotment of a small portion cannot be held as unjust one. R. Krishnammal had tried to establish her right in the proceedings under Section 145 of the CrPC. The earlier Suits, i.e., O.S. No. 71 of 1958 and O.S. No. 36 of 1963, were filed on the basis of the Will. The respondents had enough opportunities to challenge the unilateral allotment and they failed to utilise the same, and therefore, their consequential acts gained much importance. The Court also distinguished the judgment in Bhagwant P. Sulakhe (supra). It is further found that since V. Rangaswami Naidu had given written rejoinder confirming the newspaper publication dated 10.05.1955, the declaration cannot be held as unilateral and his actions had ('were' *sic*) changed the character of the Hindu Joint Family properties. Therefore, it is found that having failed to raise any objection and acted accepting the allotment, the respondents have no right to deny the life interest of R. Krishnammal and the vested interest of the appellants.

114. The entire reasoning of the Appellate Court is that while one coparcener, even after there is a division, cannot unilaterally appropriate any specific property as his exclusive property, in view of the conduct of the respondents in not challenging the said allotment in O.S. No. 71 of 1958 and O.S. No. 36 of 1963, they cannot be permitted to challenge the nature of the right to the properties. The Appellate Court also relied on the fact that the plaint schedule properties (less than 37 acres) is a small part compared to the large extent of properties which belonged to the coparcenary consisting of the two brothers.

115. As far as O.S. No. 71 of 1958 is concerned, the respondents have produced A1-Plaint. As already noted, there was no occasion for adjudication of the matter as the case was compromised. The appellants, in fact, would claim that they are not even bound by the said Decree. This is for the reason that under the said Decree, the plaint schedule properties herein have been recognised as the absolute properties of the respondents. If any reliance is to be placed on the said Decree, then, the fact that under the compromise Decree, the entire rights have been given-up by the life estate holder R. Krishnammal, stares one in his

face. A2 is the compromise Decree. It is dated 21.07.1958. The Suit was filed on 10.04.1958. It apparently may have suited the respondents to not allow the matter to go to trial. The testimony of PW1 shows, *inter alia*, as follows:

> R. Krishnammal has informed as how much you can give me. R. Krishnammal has asked for one house to live and land for food, otherwise, she did not ask for equal share in the property.

116. As far as O.S. No. 36 of 1963 is concerned, A3 is the Plaint. In A4-Written Statement filed by R. Krishnammal-First Defendant, she disputed the case about the compromise and she defended the compromise in O.S. No. 71 of 1958. The respondents were, in fact, initially not parties. We have already noticed that the compromise Decree, which ensued even in the said case, modifying the absolute estate of R. Krishnammal and limiting it to a life estate in regard to Item Nos. 5 and 6, did involve reiteration of the Will. The question would, however, arise whether, by such conduct alone, *viz*., by being parties in the said Suit, and later on when the compromise took place, by signing the same not as parties but in token of their having seen the endorsement made by plaintiff therein and R. Krishnammal and Defendant No.3 (another Legatee), they have acknowledged the title to Item Nos. 5 and 6, that it vested with V. Rangaswami Naidu and, furthermore, whether it should be treated as acknowledging the exclusive title in regard to the plaint schedule properties involved in this case and which were not scheduled in O.S. No. 36 of 1963.

117. It is to be remembered that while on the one hand, R. Krishnammal, in O.S. No. 71 of 1958, set-up the Will, as also the case of oral partition and exclusive ownership of her late husband, she also was willing to adopt the stand of the Lakshmiah branch that her late husband and his brother were not separated. On the said basis, she had also laid a claim based on the Hindu Women's Right to Property Act, 1937, and what is more, also relied upon the Hindu Succession Act. It is this Suit which was compromised. It is certainly not possible to predicate on what basis Lakshmiah branch became amenable for the compromise. It might have been different if the cause of action of R. Krishnammal was based solely on the basis of the Will. In this case, having regard to the alternate case set-up based on the rights available to her, as aforesaid, and noticing that some items out the Will were recognised as her own, and the other items which included items which were included in the

A Will and also part of the larger joint family property, she has given-up her rights, it cannot be characterised as not using of the opportunity by the Lakshmiah branch to challenge the unilateral allocation by V. Rangaswami Naidu.

118. In O.S. No. 36 of 1963 also, as we have already discussed, B at the time of the compromise in 1974, the Lakshmiah branch was already party to the compromise in O.S. No. 71 of 1958, under which they had, in fact, recognised the absolute rights in regard to Item Nos. 5 and 6 in favour of R. Krishnammal. It mattered little to them that under the compromise Decree in O.S. No. 36 of 1963, it was to be enjoyed as a life estate by R. Krishnammal and to be not alienated by her. We have C noticed that it was stated that no relief was claimed against the other Defendants in the said Suit. The inference drawn by the First Appellate Court based on not making use of the opportunity to challenge the unilateral allocation, in such circumstance, does not appeal to us.

119. Coming to the second aspect, the First Appellate Court has D noticed the fact that the property belonging to the family, was much bigger, as a result of which the unilateral allotment could not be treated as unjust. It does not address the legal issues. On the basis that there is a division in the joint family status, undoubtedly, V. Rangaswami Naidu would be freed from the stranglehold of the principle that a Hindu could E not bequeath his interest in the undivided family. As we have noticed, the moment there is a division, what emerges is the share of the erstwhile coparcener. In this case, there are only two coparceners, *viz*., V. Rangaswami Naidu and Lakshmiah Naidu. They would have one-half share between themselves. Undoubtedly, if V. Rangaswami Naidu had bequeathed his one-half share, it could not have generated legal F controversy. We emphasise that this is subject to there having been a disruption. We have also noticed that if there is a disruption in the Joint Family status and partition in the narrow sense, it produces the consequence that as regards the share of the separated coparcener, his share becomes immune from any claim based on the Doctrine of G Survivorship. We have also noticed that a bequest by a member of his interest in an undivided family, was juridically anathema, as under the Doctrine of Survivorship, persons claiming under the birth right over the property, would be preferred to those claiming under a Will. Once, this obstruction over the right of the legal heir is removed in the case of intestate succession, it would be the heirs, who would succeed. If that H

be so, can not a Hindu, be it before the Hindu Succession Act, bequeath specific properties over which he would have undoubtedly joint rights? A

120. What would be the position after bringing about a division in title but before there is a partition of the property by metes and bounds? We have noticed that during the interregnum, the properties of the family would continue to remain joint[See 1986(1) SCC 366]. In other words, unless there is a partition, *qua*, the properties, though the shares are ascertained by the partition in the sense of a division in the joint family, no coparcener could point to any specific item and claim it to be his. B

121. Now, what would be the position in regard to the power of a Hindu in the erstwhile State of Madras to transfer a specific item of property even when the family is intact. A Full Bench of the Madras High Court has dealt with this question in the decision reported in Aiyyagari Venkataramayya and another v. Aiyyagari Ramayya[49]. The pointed question which actually arose before the Court on a reference to the Full Bench was, the effect of the death of the vendor after he effects sale of his interest in the Hindu Undivided Family. The contention apparently raised was, having regard to the Doctrine of Survivorship, if the vendee did not institute a Suit to enforce his rights, while the vendor was alive, the vendee would have no right at all to enforce. Justice Bashyam Ayyangar has authored a separate Judgement wherein he has surveyed exhaustively the entire case law. The learned Judge holds *inter alia* as follows: C D E

> "The question of a member of an undivided Hindu family alienating family property for his own purposes is not a topic dealt with, as far as I am aware, by any texts of Hindu law or by the commentators. No express authority on the subject can therefore be found in the Hindu law books, and it is questionable whether an alienation by a co-parcener of his undivided share and interest was recognised by Hindu jurists. As observed by the Judicial Committee "there can be little doubt that all such alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided Hindu family and the law as established in Madras and Bombay has been one of gradual growth, founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes and work out his rights by F G

[49](1902) ILR 25 Madras 690 H

A means of a partition" Suraj Bunsi Koer v. Sheo Persad I.L.R. 5 Calc. 148."

The learned Judge further goes on to state the law in the following terms:

B "A co-parcener may profess to alienate either his undivided share in the whole of the family property or his undivided share in some specified portion of the family property-as in the present case-or the whole of a specified portion of the family property-as in the case in Venkatachella Pillai v. Chinnaiya Mudaliar 5 M.H.C.R. 166. The same thing may take place in the case of involuntary C sales also. In all these cases, the sale operates upon the interest and share of the transferor as the same existed at the date of the transfer and the transferee must work out the transfer by bringing a suit for ascertaining what the share and interest of the transferor was at the date of the transfer. Such a suit is not technically a suit for partition and the decree which he may obtain enforcing the D transfer, either in whole or in part, by a partition of the family property will not by itself break up the joint ownership of the members of the family in the remaining property, nor the corporate character of the family."

We, however, notice also the following:

E "The claim of a transferee from a co-parcener to work out the transfer is no doubt an equitable claim in the sense that he must be a transferee for value and in cases where the transfer relates to a specific portion of the family property, he has no legal right, any more than his transferor himself, to insist on that specific F portion being allotted to the share of the vendor. Being a purchaser for value he will have an equity to have such portion or so much thereof as is practicable so allotted, if that can be done without prejudice to the interests of the other sharers. In any suit which may be brought by him to enforce the sale, all the members of the G family should be joined as parties as in a partition suit, the subject-matter of the suit being the family property as it existed at the date of the transfer."

In fact the Court in *Venkatachela Pillay v. Chinnaiya Mudaliar*[50] (1870) held as under:

H [50](1870) 5 M.H.C.R. 166

"…..And the contention on behalf of the appellant is that one co-parcener cannot object to a sale of a family property made by another co-parcener when the portion of property sold is unquestionably less in quantity and value than the share of the co-parcener making the sale in the entire property.

We are of the opinion that this is an untenable objection. The decision of this Court as to the right of a co-parcener to alienate his vested interest in the property held in co-parcenery do not go beyond establishing the validity of an alienation to the extent of the coparcener's share in the particular property which is the subject of the alienation. And they are founded upon the principle that each co-parcener has a vested present undivided estate in his share, which he may at any time convert into an estate in severalty by a compulsory or voluntary partition, and that such estate is transferrible like any other interest in property. Further than this the title of the 1st defendant under the alienation in the present case cannot, we think, be carried…

xxx xxx xxx

By the sale in the present case therefore the vendor, Subbaraya, could not in our judgment transfer to the 1st defendant's father a valid title to any specific portion of the joint-family property but only to his beneficial estate as an undivided co-parcener with the incidental right of partition, and it follows that the 1st defendant is not entitled to more than the moiety of the village lands which were alone the subject of the contract of sale."

It appears there is no uniformity in regard to the power of a coparcener to sell his undivided interest. In *Sidheshwar Mukherjee v. Bhubaneshwar Prasad Narain Singh and others*[51] we notice the following:

"9. It is true that under the Mitakshara law, as it is administered in the State of Bihar, no coparcener can alienate, even for valuable consideration, his undivided interest in the joint property without the consent of his coparceners; but although a coparcener is incompetent to alienate voluntarily his undivided coparcenary interest, it is open to the creditor, who has obtained a decree again him personally, to attach and put up to sale this undivided interest,

[51]AIR 1953 SC 487

A and after purchase to have the interest separated by a suit for partition."

In *M.V.S. Manikayala Rao v. Narasimhaswami and others*[52], a case which arose against the impugned order of the High Court of Andhra Pradesh, it involved an auction sale therein the Court
B held as follows:

"….Now it is well settled that the purchaser of a coparcener's undivided interest in the joint family property is not entitled to possession of what he has purchased. His only right is to sue for partition of the property and ask for allotment to him of that
C which on partition might be found to fall to the shre of the coparcener who share he had purchased…."

122. The view of Justice Bashyam Ayyangar has also been approved by a Full Bench of five learned Judges of the High Court in K. Peramanayakam Pillai v. S.T. Sivaraman and others[53].

D 123. Thus, in the case of an alienation by a Hindu, even if it is of a specific property belonging to the joint property, it would be dealt with on an equitable basis, should the alienee bring an action to enforce the same in a properly constituted Suit. The conclusion we would arrive at is that the sale of such a right even over specific immovable property by a
E coparcener in a Mitakshara Hindu Joint Family does take effect in law where it is permitted and it would not be a case of a void transaction. The purpose of undertaking this discussion is to appreciate the law relating to the power of the coparcener to transfer specific items even if there has been no partition in the sense of a division of title so that we are in a better position to appreciate the question as to whether in a case where
F a Hindu executes a Will prior to the Hindu Succession Act could, he, by a Will, after a division is brought about in the family bequeath specific immovable property.

124. In order to understand this problem in its proper perspective, we must advert to certain vital dimensions. The real principle on the
G basis of which the interest of a coparcener in a Joint Hindu Family could not be the subject matter of a valid bequest was that the bequest would come into collision with the right to claim property by survivorship vested in the other coparceners upon their birth. Thus, it is a case of a prior

[52]AIR 1966 SC 470

H [53]AIR 1952 Madras 419

right taking precedence over the bequest which can come into force only not from the date of the making of the Will but upon the death of the Testator. This distinction, has apparently allowed courts to recognise an inter-vivos alienation which is possible only when the coparcener is alive of his interest in the Joint Hindu Family as it does not involve a conflict between the right by survivorship and rights sought to be created by the coparcener. However once there is a division, then right by survivorship ceases and there can be objection to said principle applying to a bequest of a specified immovable property. In fact, the case of a will made after division of specific immovable property stands on a different footing and the objection that the sale is by a coparcener when the joint family exists does not hold good.

125. The second point of distinction which we may notice is that as noted by Justice Bashyam Ayyangar in Aiyyagari Venkataramayya and another (supra) is that, the right was recognised as an equitable right in favour of an alienee who has purported to purchase the property for valuable consideration. A bequest may be subject to an onerous condition and the rights of the Legatee may become subject to the Doctrine of Election. A bequest, on the other hand, may involve no liability for the Legatee, in which case, he may not bear resemblance to an alienee under the inter-vivos transfer who purchases property for valuable consideration.

126. At least, as an equitable claim, can not appellants enforce their right and claim to be allotted the items on the basis that they could be allotted to the share of the Testator as in the case of a transferee from a Hindu of specific immovable property, even when the joint family continues to exist? We have noticed that the law does not render such transferee helpless. No doubt, one of the conditions which has been evolved in by Justice Bashyam Ayyangar in the decision in Aiyyagari Venkataramayya (supra) is that all the sharers must be on the party array. In this case, the said requirement is fulfilled as they are represented as Defendants 4 to 11 is O.S. No. 89 of 1983. No doubt, we notice that another requirement, in such a case, would be that all the properties of the joint family are scheduled. This requirement is not seen fulfilled and the frame of the Suit is based on exclusive title of the plaintiff and Defendants 1 to 3 which is based on bequest.

127. About the extent of property belonging to the family, it is relevant to notice that PW1 has deposed, *inter alia*, as follow:

A My brother Baktachalam gave an extent of 750 acres of land in Kollegal Village, Satyamangalam to his father in the name of Government assignment in the year 1944. Those 750 acres of land are under our family possession. My father had purchased an extent of 150 acres of land in Coimbatore from 1932 to 1958 in my name and Ramathal. More than 1,000 acres of land were B purchased from 1944 to 1958 in their family. V. Rangaswami Naidu is having right upon 1,000 acres of land purchased in Kollagal, Kollangodu, Coimbatore and Tanjore. I know that R. Krishnammal has right over 1,000 acres of land. R. Krishnammal did not claim share in 1000 acres of land in A1. When we settled the matter C and gave the share to R. Krishnammal, we did not take into account of an extent of 1,400 acres of land. R. Krishnammal did not claim share as she is having right over more than 700 acres of land.

Above is the picture regarding the availability of the family properties. They are of course not scheduled in the Plaint. We D are not exactly aware of the value of these lands.

128. We would certainly think that the Legatee under the Will, left behind by a Hindu after there is division in the family status in regard to specific properties belonging to the family, would indeed have rights *qua* the property but limited to the share of the Testator. It cannot be a E principle of law in the region of controversy that a man cannot ordinarily transfer a right greater than what he himself has. Even under the Indian Succession Act, under Section 59, there could be no prohibition in V. Ranagaswami Naidu bequeathing his share, if there was division. We have already noticed that in a bequest, the equitable consideration available to a transferee by an *intra-vivos* transaction, wherein he has paid valuable F consideration, may not apply. But this cannot mean that, if everything else is proved, the legatee should be left remediless. We did toy with the idea of considering holding in favour of the appellants even treating it to be an exercise of powers under Article 142 of the Constitution of India in the special facts of this case as brought out by the testimony of PW1 G as regards the inequity involved. No doubt, we find the frame of the Suit hardly helpful to the appellants. But having regard to the fact that the appellants must fail otherwise, we need not explore this matter further.

DOES THE WILL EFFECT A DIVISION?

129. There is an argument raised by the appellants that if no division H was caused by B1 still the terms of the Will achieve the same result. In

other words in so far as Rangaswami Naidu had in the Will indicated not only about there being a partition in 1932 but he has also stated that he continues to be a divided member till the date of the Will and he has already made an open declaration of his divided status division also flows as an inevitable result of his Will. The Will causes the disruption and therefore the respondents who are the legal representatives of Lakshmiah Naidu have no claim in law under the doctrine of survivorship. We do not think there is any merit in this argument. It may be true that though no issue as such was raised, the trial court was indeed called upon by the parties to answer this question. What is involved essentially is the reading the contents of the will so as to ascertain whether it has the impact of being the declaration of an unequivocal intent of the coparcener to separate.

130. Shri Guru Krishnakumar, learned counsel would however point out that even proceeding on the basis that there is a Will and its terms amount to a declaration since Rangaswami Naidu died on 1.6.1955 and the Will saw the light of the day as far as other coparcener is concerned only in the course of proceeding under Section 145 of the CrPC which took place much after the death, when succession opened to the estate of Rangaswami, the will not having been communicated to Lakshmiah Naidu the requirement in law was not fulfilled.

In order that Section 3(2) of the 1937 Act applies, V. Rangaswami Naidu must have died intestate, leaving behind an interest in the Hindu Undivided Family. What the appellants are calling upon us to do is to take a part of the Will which allegedly contains the declaration which in law, effects division. But if the Will is to be acted upon, then the conundrum which exists is, it could not be said that V. Rangaswami Naidu died intestate *qua* the properties which are the plaint scheduled properties. In fact, Section 5 of the 1937 Act has defined the words "die intestate" to mean that "a person shall be deemed to die intestate in respect of all property of which he has not made a testamantary deposition which is capable of take effect". On the one hand, the appellants would require this Court to hold that B10-Will should govern the rights of the parties and that it is capable of taking effect. If it is not found capable of taking effect, the cause of action would fail. If, therefore, we proceed on the basis that there is a will Section 3(2) did not apply, and R. Krishnammal, the widow, would get no right under Section 3(2). If she did not get any right under the Act with regard to the properties governed by the Will,

A then, the law relating to survivorship, under which Lakshmiah Naidu would succeed to the estate of his brother, would spring into being immediately on the death of V. Rangaswami Naidu on 01.06.1955. Could it be, however, that it is possible for the appellants to contend on the Doctrine of Relating Back propounded in *Addagada Raghavamma* (supra) that by virtue of the contents of the Will, a division is achieved upon Lakshmiah Naidu becoming aware of the Will even after the death of his brother during the proceedings under Section 145, which is an admitted position, and its effect being felt from 10.05.1955 when the Will was made and, therefore, by this reasoning, on 10.05.1955, which is before the death of V. Rangaswami Naidu, a division is effected and, therefore, the Will becomes valid? In other words, look to the Will, to find whether its contents amount to a declaration causing a division in law from 10.5.1955 and since the Will speaks from the date of the death of the Testator on 1.6.1955, the Will becomes a valid Will?

We may also, in this regard, turn to the contents of the Will, which we have already extracted in paragraph-77 hereinbefore. It will be noted that the Will starts off with the statement by the Testator that he owned the properties which included properties allotted in a partition and also which he acquired by independent purchases. Thereafter, he states that he had been a divided member since 1932 onwards. None of these statements would constitute a declaration. We have found that the case of partition in 1932 and independent purchases have been found against the appellants by three courts. Thereafter, there is only the statement that he has, in order to avoid any uncertainties, made an open declaration of his divided status 'today'. It may be difficult for us to accept this statement as a declaration sufficient in law to cause a division. However even for a moment that it would work out as a declaration, we would think that the law laid down by this Court in Addagada Raghavamma (supra), may pose obstacles insuperable in nature, for the appellants.

While it may be true that under the Doctrine of Relation Back and proceeding on the basis that the contents, as noted in the Will, amounted to a clear declaration to separate and that it would have effect from 10.05.1955, we cannot be oblivious to the creation of the vested rights. If the matter is to be governed under Section 3(2) of the 1937 Act, as already noted, it must be a case where V. Rangaswami Naidu died intestate. Therefore, if we proceed on the basis that there is a Will as indeed we must to accept the case of the appellants, Section 3(2) will

not apply. If Section 3(2) does not apply, the claim to the property by survivorship, would arise, which would be fatal to the appellants case, for the reason put forth by Shri Guru Krishnakumar, learned Senior Counsel, as noted above. That is to say, in the facts of this case, in view of the division being communicated through the Will only after the succession had opened, and even allowing for the division to have effect from 10.5.1955 when the will was made, the vested right of Lakshmiah Naidu to claim by survivorship would spring into existence on 01.06.1955 when his brother died and the subsequent communication based on the Will cannot take away vested right which became available proceeding on the basis of the Will relating to the plaint schedule properties (see in this regard para 34 of *Addagada Raghavamma* (supra).

DATE AND CONTENTS OF B1: EFFECT OF NON PRODUCTION OF LETTER DATED 11.5.1955 AND 16.5.1955

131. Coming to the actual question therefore whether B1 was in fact issued, whether its contents amount to a declaration as required to create a division, and finally whether it was communicated to Lakshmiah Naidu we find as follows:

132. The case of the appellants is that B1 is issued on 10.5.1955. B1 is a declaration published in a newspaper. B1 as noted by the first appellate Court, is as follows:

> "I have been a divided member from my brother Sri R.V. Lakshmiah Naidu ever since 1932…. I also hereby do make a declaration of my divided and separate status".

133. The further case of the appellants is that the requirement of communication to the other coparceners is complied with as is proved by the fact that having received B1 on the very next day Lakshmiah Naidu issued communication dated 11.5.1955 wherein he purported to dispute the allegation in B1 that there was a partition in the year 1932. The case of the appellants is further premised on the act of Rangaswami Naidu in sending a rebuttal, as it were, to the communication sent by Lakshmiah Naidu dated 11.5.1955 which he sent on 16.5.1955. Both the trial court and the High Court have however found it to be fatal to the appellants case that the appellants have not produced the said communication dated 11.5.1955 and 16.5.1955. The respondents also would contend that the High Court was right in its conclusion in that regard. On the other hand, the appellants would point out that the court

must not lose sight of the fact that the communication issued by Lakshmiah Naidu dated 11.5.1955 is produced as Exhibit (43) and the communication dated 16.5.1955 was produced as Exhibit 44 in proceeding under Section 145 of the CRPC. There is reference to these documents in the order passed by the Magistrate which is marked as B2 in this case. Moreover, respondents complain about absence of pleading to the effect that B1 was issuedcausing a division even by way of refuting the case set up inOS 649 of 1985 that Rangaswami Naidu died joint.

WHETHER THERE IS LACK OF PLEADING ABOUT B1 CAUSING A DIVISION IN THE JOINT FAMILY?

134. In O.S. No. 649 of 1985, filed by the respondents, it is averred that the plaint scheduled properties were joint family properties of the two brothers and it is further averred that there was no partition between them and they were living as joint family till the death of V. Rangaswami Naidu in 1955. In paragraph-5 of the Plaint, it is specifically averred that, till the death of V. Rangaswami Naidu, he and his brother constituted a joint family and there was no division in status between them, and on the death of V. Rangaswami Naidu, the surviving coparcener took all the properties by survivorship. In the Written Statement, which is filed on the appellants side (viz., the Second Defendant), we notice the following pleading in paragraph-3 of the Plaint:

> "3. R.V. Lakshmiah Naidu and V. Rangaswami Naidu were brothers. They were divided and living separately. They were cultivating their lands separately. The claim of the plaintiffs that R.V. Lakshmiah Naidu and V. Rangaswami Naidu were living as joint family and that there was no division in status till the death of V. Rangaswami Naidu is false. The joint family status between the brothers was duly disrupted and put an end to. There was also division of properties, and each was enjoying his respective properties separately. V. Rangaswami Naidu also purchased lands independently."
>
> (Emphasis supplied)

135. No doubt, in O.S. No. 89 of 1983, what is averred is that the properties belonged to one V. Rangaswami Naidu. It was further averred in paragraph-9 of the Plaint that the brothers had divided the properties as early as in 1932. Out of the nine items scheduled in the Plaint (viz., O.S. No. 89 of 1983), Item Nos. 1 to 3 and Item Nos. 6 to 9 were

allotted to the share of V. Rangaswami Naidu and were in his possession. Item Nos. 4 and 5 were purchased by V. Rangaswami Naidu long after the partition and belonged to him absolutely. We must also not lose sight of the fact that the averments in the later Suit (viz. O.S. No. 89 of 1983), makes reference to the allegations in O.S. No. 649 of 1985 (the number of the Suit after renumbering). Still further, we notice that when the issues were framed, the first issue was whether the Will executed by V. Rangaswami Naidu is true and valid and whether it came into force. A separate issue (Issue no. 2) was framed as to whether there was an oral partition. It is also noticed that in the discussion, the matter was debated before the Trial Court on the basis that by the publication of notice on 12.05.1955 in "Navva India" newspaper, there was division of the property.

136. We have already noticed the pleadings of the Second Defendant in the Written Statement in O.S. No. 649 of 1985. Both the Suits were tried together. It has been averred that the brothers were divided and living separately. The claim of the respondents that there was no division in status till the death of V. Rangaswami Naidu, has been specifically pleaded to be false. The joint family status, it has been stated, was duly disrupted and put an end to.

137. We would think that, in the facts of this case, the principle that no amount of evidence can be looked into, if there is no pleading, is in apposite. As to how the joint family status was disrupted or as to whether there was no division in status, is essentially a matter of evidence. The mere fact that it is not specifically averred, as to the mode by which the division was brought about, in our view, is not fatal to the appellants case, if it is otherwise established.

WHETHER THE CONTENTS OF B1 AMOUNT TO A DECLARATION TO EFFECT DIVISION

138. That there was no oral partition is found unassailable. Therefore, the statement in B1, about the same, needs to be ignored being incorrect but the last sentence in our view is capable of standing as a standalone statement. The use of the word 'also' appears to be deliberate. It would also probablise that there was legal advice which preceded both the making the Will and the drafting of the Notice. In B13, the executor has spoken about V. Rangaswami Naidu, expressing his desire to execute the Will on two or three occasions and about their

being legal consultation. V. Rangaswami Naidu was an educated man. An Ex. MLC. He was affluent. Setting up of the case of oral partition, was also on the wings of alleged separate purchases. There was a case that the brothers exchanged list of properties. He may have entertained the idea that what had happened, did constitute a case for oral partition. If we give credit to V. Rangaswami Naidu, to have the knowledge that a division through notice declaring intent to separate, was indispensable to the validity of the Will, as also the use of the word 'also', it is capable of being understood as the declaration sufficient in law to cause disruption in the joint family status.

139. The arguments of Mr. Gurukrishna Kumar, learned Senior Counsel, that the sentence having regard to its grammatical implications must persuade us to link it with the earlier partition, alleged in the year 1932, does not appeal to us. We should also not be unmindful of the fact that B10-Will contains the statement about having made a notice. As long as the coparcener wishes to separate, he is not required to give any reason to separate.

WHETHER THERE WAS COMMUNICATION TO THE OTHER COPARCENER

140. Now, we come to the aspect as to whether B1 was communicated. B1 has been marked in the Trial Court as dated 12.05.1955. The entire case of the appellants is that the notice was issued on 10.05.1955 and it was published in a newspaper "Navva India" as, admittedly, there is no case for the appellants that the intention to separate, was given by way of a notice directly to V. Lakshmiah Naidu. It was the case of the appellants that noticing the notice in the newspaper, Lakshmiah Naidu responded by issuing a communication dated 11.05.1955, disputing the partition. In fact, it was also the case of the appellants that Lakshmiah Naidu revealed his mind to be that for bringing about disruption, that V. Rangaswami Naidu had to communicate to the other coparceners. Still further, the appellant's case is sought to be built around the communication, by V. Rangaswami Naidu on 16.05.1955 to Lakshmiah Naidu reiterating contents of B1.

141. We have noticed that the contents of B1, having regard to the last part, would be sufficient to cause a division in the status of the joint family. The question is whether it was communicated, as is required in law. On the one hand, the communication set up by the appellants dated 11.05.1955 and 16.05.1955 are not produced. This shortcoming is

sought to be overcome by the appellants by relying upon the case set up by 'A' Party, as revealed in B2. It is the order passed by the Magistrate under Section 145 of the CrPC. We do notice, as far as the Notice issued by V. Rangaswami Naidu, it is a notice in a newspaper. It may not be as difficult in procuring a copy of the newspaper as it might be to procure the private communications, as contained in the letters dated 11.05.1955 and 16.05.1955. We do notice that the letters dated 10.5.1955, 11.05.1955 and 16.05.1955 have been purportedly marked as B42, B43 and B44, respectively, in proceedings which culminated in B2. The pleadings in support of these documents are indeed adverted to in B2, order passed by the Magistrate.

142. Regarding B2-Order, passed under Section 145 of Cr.PC a contention is raised that it is not relevant under Section 40 to 43 of the Evidence Act. This question is not seen raised in the courts below. It may be true that Section 40 deals with previous judgments which would constitute a bar to the fresh proceedings and B2 is, therefore, not relevant under Section 40 of the Evidence Act. Section 41 also deals with judgments rendered in probate, matrimonial, admiralty or insolvency jurisdiction, which has the effect mentioned in Section 41 of the Evidence Act. It is clearly inapplicable to the facts of the case. Section 42 deals with decisions being relevant if they relate to matters of public nature relevant to the inquiry. It is also not relevant. Section 43 reads as follows:

> "43. Judgments, etc., other than those mentioned in sections 40 to 42, when relevant.—Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provisions of this Act."

143. In this regard, we have scanned B2-Order. The relevant part where the pleading is set out is as follows:

> "The deceased declared his divided status by a notice in the 'Nava India' dated 10.5.1955 (Exhibit P42). This attracted the attention of B Party No. 1 who wrote to him on 11.5.55 (Exhibit P43) that all of them were undivided and that if the deceased wanted to get divided he had to intimate it to the other copartners. The deceased replied on 15.5.55 by Exhibit P44 that the stand taken by B Party No. 1 was not correct. This was acknowledged by a B Party No. 1 on 17.5.55 (Exhibit P45).

144. What is conspicuous by its absence in B2-Order is the response of the B Party in regard to these documents. It is not a case where there is reference to the pleading of the B Party, viz., the Lakshmiah branch that they admit the issuance of B42, B43 and B44. But there is no denial either. B2 would show that there was a case for the A Party on the lines we have indicated. Except for the discrepancy in the date of 'B1' being 12.5.1955 whereas B42 is dated 10.5.1955, there is consistency in the case set up by the appellants.

145. The question relating to relevancy of judgments has been considered by a Bench of this Court in *State of Bihar v. Radha Krishna Singh and Others*[54]. The Court took the view that reliance cannot be placed on judgment based on Section 13 of the Evidence Act if it is not falling under Sections 40 to 42. Thereafter the Court held as follows:

> "129. In *Gadadhar Chowdhury* v. *Sarat Chandra Chakravarty* [AIR 1941 Cal 193 : (1940) 44 Cal WN 935 : 195 IC 412 : 72 Cal LJ 320] it was held that findings in judgments not inter partes are not admissible in evidence. In this connection a Division Bench of the Calcutta High Court observed as follows :
>
> "Though the recitals and findings in a judgment not inter partes are not admissible in evidence, such a judgment and decree are, in our opinion, admissible to prove the fact that a decree was made in a suit between certain parties and for finding out for what lands the suit had been decreed.
>
> 130. This, in our opinion, is the correct legal position regarding the admissibility of judgments not inter partes."

We do notice that the second of 'A' party in fact was the executor of the Will under which the appellants claim.

146. Interestingly, the respondents have produced as A109 which has been marked as the copy of the type set in the revision before the High Court (the revision is filed against order B2 passed in Section 145 proceedings). It is shown wrongly marked as the order in the proceeding. Therein we notice that the contents include apart from the impugned order (B2) the respondents documents. Among the contents the Exhibits filed on behalf of the B party are produced. It also contains the evidence of L. Venkatapathy who is none other than PW1 in this case. Therein,

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there is no mention about B42, B43 and B44 in his examination. In his cross examination after stating that he found his signature(Testator) in every page of [Exhibit B68], the Will he deposed,he did not know if his father had replied to the publication in 'Navva India'. We do not know what prevented the plaintiff in O.S. No. 83 of 1989 from producing the documents B42, B43 and B44 which would have also been available as the documents filed by the B party has been produced by B party as part of A109. There is no finding in B2 about B42 publication, B43 or B44.

147. During the hearing, it was pressed before us by the respondents that B1 is dated 12.05.1955 and if it is 12.05.1955, the very edifice of the appellant's case would fall to the ground as then it would be impossible to support the position that in response to the notice which is published on 12.05.1955, the reply could be given on the previous date, i.e., on 11.05.1955 by Lakshmiah Naidu. It is here that the non-production of the letters dated 11.05.1955 and 16.05.1955, are sought to be emphasized. As noted, we did call for the records to verify whether marking of the documents B1 dated 12.05.1955 was a mistake, as pointed out byMr. C.A. Sundaram, learned Senior Counsel or it did reflect the ground reality. We find from B1 that Notice is published in the newspaper which is dated 12.05.1955. Therefore, the marking of the document B1, as dated 12.05.1955, is not a mistake. What are the consequences that flow from the said finding? One way to look at would be that since the notice containing the declaration, is published in a newspaper only on 12.05.1955, the case of the appellants that Lakshmiah Naidu gave a reply on 11.05.1955, on noticing the notice, cannot be accepted. If the same is not accepted, then, the question of V. Rangaswami Naidu, sending a rejoinder, as it were also, would not arise.

148. We have considered the contents of the Will. There is a reference to the publication of the Notice on the said date. The Will is dated 10.05.1955. It appears to us quite clear that the Will would not have been written on 10.05.1955. It is, no doubt, executed on 10.05.1955, which we have already found. Having regards to the details in the Will and the other circumstances, we are inclined to believe that it would have been drafted earlier. Equally, publication of a matter in a newspaper would have been arranged earlier. But what is important is, not merely the intention of the Testator as a coparcener to declare his mind to the other coparcener to separate, and even have it set-out in the Will, and further even going a step further, getting it published, but it must be

A proved further that, before the Testator passed away, the matter contained in B1 was known to the other coparcener, *viz*., Lakshmiah Naidu. This requirement is indispensable as held in *Addagada Raghavamma and others* (supra). In this regard, we notice that DW1, the witness on behalf of the appellants, has this to say:

B "On 11.05.1955, Lakshmiah Naidu gave a reply in response to B1. The same is marked as B44 in CrPC 145 Proceedings. He clearly admitted about the division in status made between Rangaswami Naidu and Lakshmiah Naidu."

149. This statement goes against the appellants case. It appears C to be the case of R. Krishnammal and the Executor in Section 145 of the CrPC proceedings as what is stated is that on seeing B42 (which is marked as the 'Notice' published on 10.05.1955), Lakshmiah Naidu sent B43 stating that there was no partition between them, for which, the deceased sent B44 reply. Thereafter, DW1 says that on 10.05.1955, on publication of advertisement in "Navva India", he came to know that D one objection advertisement was published on the very next date.

150. Let us see what PW1 said, who was 26 years of age in 1955 and who has also given evidence in Section 145 CrPC proceedings. If there is a clear admission by him, establishing that the declaration was known to Lakshmiah Naidu before the death of V. Rangaswami Naidu, E the appellants may succeed on this point subject to the contradiction being resolved about the date of B1. After stating that, on 10.05.1955, V. Rangaswami Naidu issued Notice in India newspaper, as the partition was done, and stating that, V. Rangaswami Naidu fictionally made such paper advertisement, he, thereafter, says that he came to know about F the newspaper advertisement and Will, only in Section 145 of the CrPC proceedings. Thereafter, he says, on 12.05.1955, V. Rangaswami Naidu gave one paper publication in "Navva India". But again, he says he came to know regarding the same during Section 145 proceedings. He further says that his father did not ask V. Rangaswami Naidu as to why he gave B1 publication. The witness says, he is not aware why B1 G publication was given. Thereafter, he says, he does not know now whether the newspaper advertisement was filed by his paternal small Uncle in Section 145 proceedings. It has been mentioned in A1 that his father made advertisement in respondent to B1. He further says that his father may be given that advertisement (Being translation from Tamil, it H does not obviously do justice. We read it as "his father may have give

that advertisement"). He says that the advertisement given by his paternal small Uncle and his father reply advertisement was filed in A1-Suit and he says that it is not correct to say that his father had admitted that a division in shares and his father gave newspaper advertisement as the properties were not partitioned by metes and bound. He says that it has been mentioned in A1 (Plaint in O.S. No. 71 of 1958), as Rangaswami Naidu gave a reply on 16.05.1955 to his father. He then admits that it is correct to say that those are marked as B42, B43 and B44, respectively, in ('as' *sic)* Section 145 of the CrPC proceedings and he gave the deposition in those proceedings. We would think that this is a vital piece of evidence which may show that B43 is the communication dated 11.05.1955 which must be taken to be sent by his father to which V. Rangaswami Naidu respondend on 16.05.1955. This should mean that the publication on 10.05.1955 became known to Lakshmiah Naidu, as set-out in B2. The exact contents of B43 are not available.

151. When PW1 was examined in Section 145 of the CrPC proceedings, in the chief examination, he does not say a word about B42, B43 or B44. Then, in cross-examination, he says that he does not know if his father had replied to the publication in "Navva India".

152. We must notice that the High Court has proceeded on the basis of the inconsistency in the matter. There is no pleading in regard to B42, B43 or B44 in O.S. NO. 89 of 1983. In answer to the plaintiffs case, based on B1, which is dated 12.05.1955, the High Court finds that the First Defendant set-up a case that the Notice was published on 10.05.1955. The High Court also noticed the non-production of the communications dated 11.05.1955 and 16.05.1955.

153. However, there is no case that the Notice was published on two days, *viz*., on 10.05.1955 and 12.05.1955. What is evidence produced before the Court is B1, which is dated 12.05.1955. If that is so, despite the inferences one could possibly draw from the deposition of PW1, it would bring it into collision with the evidence before us. If we proceed on the basis of B1, which is dated 12.05.1955, then, the reply being sent on 11.05.1955, becomes impossible. If there is no reply sent on 11.05.1955, then, it will not be possible to attribute communication of the Notice to separate to Lakshmiah Naidu. In such circumstances, we would agree with the High Court that the case relating to B1, though there is a publication made, we cannot attribute knowledge of the same to Lakshmiah Naidu, before the death of his brother. We are not, for a

A moment, holding that a Notice in a newspaper cannot serve as a Notice by a coparcener to effect division. However, merely causing a Notice to be published, without there being evidence to show that the intended recipient became aware of it, may not suffice. Though a Notice in a newspaper is purported to serve as Notice to the general public, what is required is Notice to the concerned coparcener [See paragraphs-28 and 32 of Addagada Raghavamma (supra), extracted by us in paragraph-89 hereinbefore]. There cannot be a presumption that a person has read a particular newspaper, and even more importantly, that he has read the Notice. Even the case of the appellants appears to be that, on seeing the Notice dated 10.05.1955, the communication dated 11.05.1955 was sent by Lakshmiah Naidu, which we have found unacceptable, having regard to B1 being dated 12.05.1955. The importance of the reply dated 11.05.1955 was that it would establish knowledge of the Notice by Lakshmiah Naidu. There is no evidence that the Notice published in the newspaper dated 12.05.1955 was known to Lakshmiah Naidu before his death.

Since there was no division brought about by V. Rangaswami Naidu before his death in view of the above discussion, the Will would be invalid and therefore it would be the end of the road for the appellants. It is to be remembered that Rangaswami Naidu died on 1.6.1955, which was before the enactment of Hindu Succession Act, 1956. Thus, when he died, he left behind an interest in the Hindu joint family. When succession opened to his estate, it is therefore, the provisions of Section 3(2) of the Hindu Women's Right to Property Act, 1937 which apply. A limited estate in other words sprung into being in favour of R. Krishnammal, his widow. This estate would bloom under Section 14 (1) of the H.S.A. into an absolute estate. When she compromised in OS 71 of 1958 giving up her rights over the property which included the plaint scheduled property in these cases,it conferred absolute rightsin favour of the Lakshmiah Naidu branch. We again reiterate the effect of the death of Rangaswami Naidu being before the Hindu Succession Act came into forceto be that it would deprive persons of rights available in respect of a Hindu who dies intestate after the Act came into force.

Now assuming that there was a valid Will, that is, there was a division effected in the family, we will consider whether the life estate under the Will attractSection 14(1) or Section 14(2) of the Hindu Succession Act.

SECTION 14 (1) VERSUS 14 (2) OF HINDU SUCCESSION ACT 1956

154. Section 14 of the Hindu Succession Act 1956 reads as follows:

"4. Property of a female Hindu to be her absolute property.—

(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner. Explanation.—In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

155. Not only is the interpretation to be placed on Section 14 not *res integra*, it has engaged the attention of courts, including this Court, on a large number of occasions. A large number of decisions has been cited before us. The appellants would contend that in the facts of this case the provisions of Section 14(2) would apply whereas the branch of Lakshmiah Naidu would invite us to uphold the view of the High Court that Section 14(1) applies.

156. If Section 14(1) applies, it has the following impact:

The estate which R. Krishnammal had in the properties including the plaint schedule properties would become absolute. Then, the very edifice of the claim made by the appellants who were legatees under the Will conferred with absolute rights on the death of R. Krishnammal would collapse and they would have no right. If on the other hand, Section 14(2) applies, then, again on the basis that there is a will left behind by Rangaswami Naidu which is otherwise valid and genuine, the appellants could claim title as remaindermen.

157. Before we consider the case law, it is necessary to deal with the contention of the appellants that R. Krishnammal did not set up a case under Section 14(1) and that she claimed only under the will in OS No.71 of 1958 we need only refer to para 11 of OS No.71 of 1958. The same reads as under:

> "11. The plaintiff however further states that even on the very case set up by R.V. Lakshmiah Naidu in the 145 proceedings and the admission made by him, her rights are even better and as a coparcener she is entitled under the combined operation of Acts XVIII of 1937 and XXX of 1956 to an absolute state in one half of the joint properties and to demand partition and possession of her share. Defendants 1 to 4 are entitled to the other half share. The plaintiff is unable to specify exactly all the properties in the possession of the defendants 1 to 4 but as far as she has been able to do so, she has set them out in Schedule II. The plaintiff craves leave to add to them as and when she gets better particulrs. The plaintiff also prays that the defendants 1 to 4 might be called upon to make a full and true disclosure of the joint family properties in their possession."

It is clear that she expressly referred to the Hindu Succession Act also.

158. Mst. Karmi v. Amru and Others[55] is a judgment which is rendered by three learned judges. It was a case where a Will was executed revoking the earlier will by which a Hindu bequeathed his entire estate on his widow during her life, and thereafter, the same was to devolve on his collaterals. The Will was dated November 13, 1937. This Court held that the widow having succeeded on the strength of the Will could not claim any right over and above what was given to her under the Will. It was held that the life estate could not become absolute estate under the Hindu Succession Act 1956.

159. V. Tulasamma v. Sesha Reddy[56] is a Judgment rendered by a Bench of three learned Judges. It was a case where the husband of the appellant therein died in a state of jointness with his brother in the year 1939. She obtained a Decree for maintenance. This was followed by execution proceedings wherein an out of court of settlement took

[55] (1972) 4 SCC 86
[56](1977) 3 SCC 99

place under which the appellant was allotted scheduled properties which was certified on 30th July, 1949. However, it was a limited interest with no power of alienation. The suit out of which an appeal arose was filed by the respondent impugning an alienation made by the appellant. On these facts, we notice the following principles have been laid down:

> "*62*. (*1*) The Hindu female's right to maintenance is not an empty formality or an illusory claim being conceded as a matter of grace and generosity, but is a tangible right against property which flows from the spiritual relationship between the husband and the wife and is recognised and enjoined by pure Shastric Hindu law and has been strongly stressed even by the earlier Hindu jurists starting from Yajnavalkya to Manu. Such a right may not be a right to property but it is a right against property and the husband has a personal obligation to maintain his wife and if he or the family has property, the female has the legal right to be maintained therefrom. If a charge is created for the maintenance of a female, the said right becomes a legally enforceable one. At any rate, even without a charge the claim for maintenance is doubtless a pre-existing right so that any transfer declaring or recognising such a right does not confer any new title but merely endorses or confirms the pre-existing rights.
>
> (*2*) Section 14(1) and the Explanation thereto have been couched in the widest possible terms and must be liberally construed in favour of the females so as to advance the object of the 1956 Act and promote the socio-economic ends sought to be achieved by this long-needed legislation.
>
> (*3*) Sub-section (2) of Section 14 is in the nature of a proviso and has a field of its own without interfering with the operation of Section 14(1) materially. The proviso should not be construed in a manner so as to destroy the effect of the main provision or the protection granted by Section 14(1) or in a way so as to become totally inconsistent with the main provision.
>
> (4) Sub-section (2) of Section 14 applies to instruments, decrees, awards, gifts, etc. which create independent and new titles in favour of the females for the first time and has no application where the instrument concerned merely seeks to confirm, endorse, declare or recognise pre-existing rights. In such cases a restricted estate in favour of a female is legally permissible and Section

A 14(1) will not operate in this sphere. Where, however, an instrument merely declares or recognises a pre-existing right, such as a claim to maintenance or partition or share to which the female is entitled, the sub-section has absolutely no application and the female's limited interest would automatically be enlarged into an absolute one by force of Section 14(1) and the restrictions placed, if any, under the document would have to be ignored. Thus where a property is allotted or transferred to a female in lieu of maintenance or a share at partition, the instrument is taken out of the ambit of sub-section (2) and would be governed by Section 14(1) despite any restrictions placed on the powers of the transferee.

C (5) The use of express terms like 'property acquired by a female Hindu at a partition', 'or in lieu of maintenance', 'or arrears of maintenance', etc. in the Explanation to Section 14(1) clearly makes sub-section (2) inapplicable to these categories which have been expressly excepted from the operation of sub-section (2).

D (*6*) The words 'possessed by' used by the legislature in Section 14(1) are of the widest possible amplitude and include the state of owning a property even though the owner is not in actual or physical possession of the same. Thus, where a widow gets a share in the property under a preliminary decree before or at the time when the 1956 Act had been passed but had not been given actual possession under a final decree, the property would be deemed to be possessed by her and by force of Section 14(1) she would get absolute interest in the property. It is equally well settled that the possession of the widow, however, must be under some vestige of a claim, right or title, because the section does not contemplate the possession of any rank trespasser without any right or title.

(7) That the words 'restricted estate' used in Section 14(2) are wider than limited interest as indicated in Section 14(1) and they include not only limited interest, but also any other kind of limitation that may be placed on the transferee."

160. In Shakuntla Devi v. Kamla[57], again, a Bench of three learned Judges was dealing with a case where Hindu wife was given a life interest for maintenance by a Will. The Court followed the Judgment in

H [57] (2005) 5 SCC 390

V. Tulsamma (supra) and took the view that it is Section 14(1) which would apply. The terms of the Will inter alia provided that the property was not to be alienated and it was meant for their maintenance. This is a case where testator had three wives of which one had pre deceased him. Under the Will after the death of the second wife the life estate came to be vested with the third wife. The Will provided that the wife was provided with the property for her maintenance without any power of alienation.

161. In Sadhu Singh v. Gurdwara Sahib Narike[58], a Bench of two learned Judges had the following facts before it. The property in question was self-acquired property. It became the subject matter of the Will by a Hindu in favour of his wife on 07.10.1968. His widow gifted the property to a Gurudwara. This became subject matter of the litigation and the question arose whether the matter fell under Section 14 (1) or 14(2). This Court speaking though P.K. Balasubramaniam, J. noted the provisions of the Hindu Adoption and Maintenance Act and held that, in the absence of the any instrument or Decree providing for it, no charge for maintenance is created in the separate property of the husband. The Court proceeded to notice the facts in V. Tulsamma (supra) and found that it was a case where the female Hindu possessed the property on the date of the Act (Hindu Succession Act, 1956) in which she had a pre-existing right which got transformed into an absolute right. Thereafter, the Court proceeded to hold as follows:

> "7. Now, it is clear from the section and implicit from the decisions of this Court, that for Section 14(1) of the Act to get attracted, the property must be possessed by a female Hindu on the coming into force of the Hindu Succession Act. In *Mayne on Hindu Law*, 15th Edn., p. 1171, it is stated:
>
> "On a reading of sub-section (1) with Explanation, it is clear that wherever the property was possessed by a female Hindu as a limited estate, it would become on and from the date of commencement of the Act her absolute property. However, if she acquires property after the Act with a restricted estate, sub-section (2) applies. Such acquisition may be under the terms of a gift, will or other instrument or a decree or order or award."

[58] AIR 2006 SC 3282

A 8. In *Gummalapura Taggina Matada Kotturuswami* v. *Setra Veeravva* [1959 Supp (1) SCR 968 : AIR 1959 SC 577] this Court quoted with approval (at SCR pp. 977-78) the following words of Justice P.N. Mookherjee, in *Gostha Behari Bera* v. *Haridas Samanta* [AIR 1957 Cal 557 : 6 CWN 325] (AIR at p. 559, para 12):

B

"The opening words 'any property possessed by a female Hindu' obviously mean that, to come within the purview of the section, the property must be in possession of the female concerned at the date of commencement of the Act. They clearly contemplate the female's possession when the Act came into force. That C possession might have been either actual or constructive or in any form, recognised by law, but, unless the female Hindu, whose limited estate in the disputed property is claimed to have been transformed into absolute estate under this particular section, was at least in such possession, taking the word 'possession' in its widest connotation, when the Act came into force, the section D would not apply." and added: (SCR p. 978)

"In our opinion, the view expressed above is the correct view as to how the words 'any property possessed by a female Hindu' should be interpreted."

E 9. In *Eramma* v. *Verrupanna* [(1966) 2 SCR 626 : AIR 1966 SC 1879] this Court emphasised that the property possessed by a female Hindu as contemplated in the section is clearly the property to which she has acquired some kind of title whether before or after the commencement of the Act and negatived a F claim under Section 14(1) of the Act in view of the fact that the female Hindu possessed the property on the date of the Act by way of a trespass after she had validly gifted away the property. The need for possession with a semblance of right as on the date of the coming into force of the Hindu Succession Act was thus emphasised."

G

162. Still further, the Court proceeds to hold that V. Tulsamma (supra) is applicable when a female Hindu possesses the property on the date of the Act under semblance of a right whether it is limited or pre-existing act. It further held that it cannot be applied ignoring the requirement of the female Hindu having to be in possession of property H directly or constructively as on the date of the Act though she may

acquire a right to it even after the Act. It relied on judgment of this Court in Bhura and others v. Kashi Ram[59], which was a case where the father had bequeathed the property under the Will and it is held that it is 14 (2) which will apply. Lastly, the Court also relied on Sharad Subramanyan v. Soumi Mazumdar and others[60]. It is finally also necessary to notice paragraphs-11, 12, 13 and 14 of the judgment in Sadhu Singh v. Gurdwara Sahib Narike and others[61]:

> "11. … What emerges according to us is that any acquisition of possession of property (not right) by a female Hindu after the coming into force of the Act, cannot normally attract Section 14(1) of the Act. It would depend on the nature of the right acquired by her. If she takes it as an heir under the Act, she takes it absolutely. If while getting possession of the property after the Act, under a devise, gift or other transaction, any restriction is placed on her right, the restriction will have play in view of Section 14(2) of the Act.
>
> 12. When a male Hindu dies possessed of property after the coming into force of the Hindu Succession Act, his heirs as per the Schedule, take it in terms of Section 8 of the Act. The heir or heirs take it absolutely. There is no question of any limited estate descending to the heir or heirs. Therefore, when a male Hindu dies after 17-6-1956 leaving his widow as his sole heir, she gets the property as Class I heir and there is no limit to her estate or limitation on her title. In such circumstances, Section 14(1) of the Act would not apply on succession after the Act, or it has no scope for operation. Or, in other words, even without calling in aid Section 14(1) of the Act, she gets an absolute estate.
>
> 13. An owner of property has normally the right to deal with that property including the right to devise or bequeath the property. He could thus dispose it of by a testament. Section 30 of the Act, not only does not curtail or affect this right, it actually reaffirms that right. Thus, a Hindu male could testamentarily dispose of his property. When he does that, a succession under the Act stands excluded and the property passes to the testamentary heirs. Hence, when a male Hindu executes a will

[59](1994) 2 SCC 111
[60](2006) 8 SCC 91
[61](2006) 8 SCC 75

bequeathing the properties, the legatees take it subject to the terms of the will unless of course, any stipulation therein is found invalid. Therefore, there is nothing in the Act which affects the right of a male Hindu to dispose of his property by providing only a life estate or limited estate for his widow. The Act does not stand in the way of his separate properties being dealt with by him as he deems fit. His will hence could not be challenged as being hit by the Act.

14. When he thus validly disposes of his property by providing for a limited estate to his heir, the wife, the wife or widow has to take it as the estate falls. This restriction on her right so provided, is really respected by the Act. It provides in Section 14(2) of the Act, that in such a case, the widow is bound by the limitation on her right and she cannot claim any higher right by invoking Section 14(1) of the Act. In other words, conferment of a limited estate which is otherwise valid in law is reinforced by this Act by the introduction of Section 14(2) of the Act and excluding the operation of Section 14(1) of the Act, even if that provision is held to be attracted in the case of a succession under the Act. Invocation of Section 14(1) of the Act in the case of a testamentary disposition taking effect after the Act, would make Sections 30 and 14(2) redundant or otiose. It will also make redundant, the expression "property possessed by a female Hindu" occurring in Section 14(1) of the Act. An interpretation that leads to such a result cannot certainly be accepted. Surely, there is nothing in the Act compelling such an interpretation. Sections 14 and 30 both have play. Section 14(1) applies in a case where the female had received the property prior to the Act being entitled to it as a matter of right, even if the right be to a limited estate under the Mitakshara law or the right to maintenance."

163. This Judgment came to be followed in Jagan Singh (Dead) Through Lrs. v. Dhanwanti and another[62] by a Bench of two learned Judges. It was a case where the testator executed a registered Will in respect of Plot X with the restriction that the Legatee would not have the right to transfer the property. The matter arose out of a suit for injunction restraining alienation of Property X. This Court purported to follow the judgment rendered by a Bench of three learned Judges in

[62] (2012) 2 SCC 628

Navneet Lal alias Rangi v. Gokul and others[63]. We have perused the Judgment in Navneet Lal alias Rangi (supra). We notice that the question which arose for consideration was whether the Will bestowed an absolute estate or limited estate on a widow. The Court, on a construction of the Will, found that it only created a limited interest on the widow. It is noteworthy that the Court was not dealing with the question whether the limited estate would blossom into Section 14(1). In Sharad Subramanyan v. Soumi Mazumdar and others[64], the Court found that there was no material to indicate that the property was given to a Hindu female in lieu of her right to maintenance. It is a case where it is found that the wife was living with her husband, and till the Will was probated, she was enjoying the property as her own. Jupudy Pardha Sarathy v. Pentapati Rama Krishna[65] is a Judgment rendered by two learned judges. It was a case where a Hindu executed a Will in favour of his wife which she was to enjoy but after her death one of her sons was to have the property with absolute right. The question arose again whether the case attracted Section 14(1) or 14(2). The Court noticed Mst. Karmi (supra), V. Tulasamma (supra), Sadhu Singh (supra) and Sharad Subramnayan (supra)apart from Shivdev Kaur (Dead) by Lrs. (supra). Thereafter, the Court referred to R.B.S.S. Munnalal and others v. S.S. Rajkumar and others[66] among other decisions and distinguished Sadhu Singh noting that therein the court proceeded on the basis that women had no pre-existing right in the property and therefore the life estate could not be enlarged to absolute under Section 14(1). We further notice that it was found that it was not disputed that the widow was enjoying the property by way of maintenance. The Court, therefore, distinguished Judgment of G. Rama Rao.

164. In Gumpha (Smt.) and others v. Jai Bai[67], a Bench of two learned Judges was dealing with a case where a Will was executed in the year 1941 by a Hindu giving one-half share to each of his wives for their life and the only daughter was to be the ultimate beneficiary. There was a further Will executed by one of the wives in favour of a complete stranger to the family, viz., her domestic servant. The alienation was challenged and the question arose whether the right fell under Section

[63] (1976) 1 SCC 630
[64](2006) 8 SCC 91
[65] (2016) 2 SCC 56
[66] AIR 1962 SC 1493
[67](1994) 2 SCC 511

A 14(1) or 14(2) of the Hindu Succession Act. The Court undertook an elaborate discussion and came to the conclusion that it was a case which fell under Section 14(2) of Hindu Succession Act. The Court, in fact, took the view that the Legislature did not intend to confer a higher right on a Hindu woman as against a man. This Judgment came to be considered in a later Judgment by a Bench consisting of three learned B Judges, i.e., in C. Masilamani Mudaliar and others v. Idol of Sri Swaminathaswami Swaminathaswami Thirukoil and others[68]. This case also involved a Will in favour of the widow of one Somasundaram Pillai. The statements in the Will indicated Testator entertained in his mind his duty to provide maintenance to his wife. The Court undertook a review C of the earlier case law. It proceeded to find that the view taken in Gumpha (Smt.) (supra) was a restrictive interpretation which did not appear to be sound in law.

165. In Gulwant Kaur and another v. Mohinder Singh and others[69], a Bench of two learned Judges referred to the elaborate correspondence D between the husband and his wife and found that the case attracted Section 14(1) of the Hindu Succession Act. It was found from perusal of the letter from the husband to his wife that the land was given in lieu of her maintenance. The Court, in fact, expressed its inability to understand the distinction between the day-to-day expenses and maintenance. The Court distinguished Eramma v. Veerupana[70]. Further, the Court dealt E with the argument that the decision of this Court in Bai Vajia (Dead) by Lrs. v. Thakorbhai Chelabhai and others[71] must be understood as laying down that what was enlarged under Section 14(1) of the Hindu Succession Act was a womans estate under Hindu law. We notice pararagraph-8A of Gulwant Kaur (supra), which reads as follows:

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> "8A. Shri Tarkunde particularly relied on the following passage in *Bai Vajia* v. *Thakorbhai case* [(1979) 3 SCC 300: AIR 1979 SC 993 :
>
> "A plain reading of sub-section (1) makes it clear that the concerned Hindu female must have limited ownership in property, G which limited ownership would get enlarged by the operation of that sub-section. If it was intended to enlarge any sort of a right

[68]AIR 1996 SC 1697/(1996) 8 SCC 525
[69]AIR 1987 SC 2251
[70]AIR 1966 SC 1879
H [71]AIR 1979 SC 993

which could in no sense be described as ownership, the expression 'and not as a limited owner' would not have been used at all and becomes redundant, which is against the well recognised principle of interpretation of statutes that the legislature does not employ meaningless language."

We do not understand the court as laying down that what was enlarged by sub-section (1) of Section 14 into a full estate was the Hindu woman's estate known to Hindu law. When the court uses the word "limited estate", the words are used to connote a right in the property to which the possession of the female Hindu may be legitimately traced, but which is not a full right of ownership. If a female Hindu is put in possession of property pursuant to or in recognition of a right to maintenance, it cannot be denied that she has acquired a limited right or interest in the property and once that position is accepted, it follows that the right gets enlarged to full ownership under Section 14(1) of the Act. That seems to us to follow clearly from the language of Section 14(1) of the Act."

(Emphasis supplied)

166. Appellants cannot derive support from the judgment reported in *Gaddam Ramakrishnareddy and Others v. Gaddam Ramireddy and Another*[72]. Therein, a gift deed was executed on 21.12.1952 creating a life estate and which no doubt was prior to the Hindu Succession Act. It was held that the right did not blossom into an absolute estate under Section 14(1). It is necessary to notice that the decision turned essentially on the consideration of the terms of gift deed and what is more important is the following finding:

"28. The aforesaid provision has been considered by both the courts below which have concurrently held that the life estate created by Pullareddy in favour of Sheshamma was not in lieu of her maintenance as she was already managing the properties in question and in no uncertain terms it was the donee's desire that the said properties should ultimately go to his son Ramireddy, Respondent 1 herein. Once that is established, apart from other surrounding circumstances, the immediate fallout is that Sheshamma's rights in the properties came to be governed by

[72]2010(9) SCC 602

A sub-section (2) of Section 14 of the Hindu Succession Act, 1956, and her right does not blossom into an absolute estate as contemplated under sub-section (1)."

167. We have already adverted to the terms of the Will. It is recited in the Will that the properties mentioned in 'A Schedule' are B bequeathed to his wife, no doubt, for her life. This is a case where the Will itself specifically recites that she is to take income from the properties for her expenses, *inter alia*. She is to make use of the income also for giving presents to his sisters on ceremonial occasions. Therefore, this is a case where the very document, which the appellants lays store by, makes it unnecessary for us to search for any evidence to find out what C is the purpose of giving the property. The Testator has made his motive clear. The argument of the appellants that the very same document refers to the fact that she has been given other properties towards her maintenance, does not, in our view, detract from the central question as to what impelled the Testator to create the life estate. The Will was D executed on 10.05.1955 which is prior to the Hindu Succession Act unlike in the case of *Sadhu Singh* (supra). Obviously, such a Will could not have been executed anticipating the provisions of Section 14(2) of the Hindu Succession Act. R. Krishnammal was certainly entitled to maintenance and the bequest in question expressly refer to the purposes. The properties involved were not bequeathed to R. Krishnammal without E her having any right at all. The Will did not purport to bequeath property by way of creating new rights in the facts of this case. Even the case of the appellants is that she was provided for maintenance by giving her other properties as indicated in the Will. If the argument of the appellants is to be accepted, we would have to consider whether what would be F the quantum of maintenance which the Testator would consider appropriate. The extent of the other property is not shown. We would think that such an exercise is unnecessary when the terms of the Will indicate that the Testator intended that his widow should be able to maintain herself appropriately from the income of the properties he was bequeathing to her also, and for that purpose, created, no doubt what G can be described as, a limited estate.

168. In this regard, we may also notice that the following observations in *C.Masilamani Mudaliar v. Idol of Sri Swaminathaswami*[73]:

H [73]AIR 1996 SC 1697

"30. Shri Rangam then contended that when the testator has thought of providing only maintenance to the two widows, the properties being more than 10 acres, the maintenance must be only proportionate to the needs of the widow and to that extent the widow acquires an absolute right but not the entire property. We find no force in that contention. It is to be seen that under the pre-existing law, she is entitled to remain in possession of the whole estate known as widow's estate and after the Act has come into force that widow's estate was blossomed into an absolute estate by operation of Section 14(1). Even in the Will Ex. A-1, no such restrictive covenant was engrafted giving reasonable proportion of income consistent with her needs for maintenance. On the other hand, the express covenant is that, he recognised her right to maintenance and in lieu of the maintenance property was given to her for her maintenance during her lifetime. That is the pre-existing right as per then existing law. After the Act has come into force, the limited estate has blossomed into an absolute estate. Therefore, the doctrine of proportionality of maintenance is not applicable and cannot be extended."

169. In such circumstances, we would think that the view taken by the High Court that Section 14(1) of the Hindu Succession Act applies, cannot be characterised as erroneous.

'POSSESSED' OF IN SECTION 14(1) OF HINDU SUCCESSION ACT, THE PLEADING AS TO POSSESSION OF THE PLAINT SCHEDULE PROPERTY IN O.S. NO. 89/83 AND O.S. NO. 71/58 AND ITS IMPACT.

170. In O.S. No. 89 of 1983, there is reference to the death of Krishnammal on 30.04.1977 and that thereupon the plaintiff and defendants 1 to 3 have become entitled to possession. We further notice paragraph 5 wherein it is stated that the plaintiff and Defendants 1 to 3 (branch of Lakshmiah Naidu) were in possession of the properties and enjoyment thereof jointly. However, we further notice that in paragraph 21, it is alleged that the defendants 4 to 11 (branch of Lakshmiah Naidu) are in possession without any title whatsoever, and that their possession is wrongful.

171. If we revert backwards in point of time, we notice the following pleadings in O.S. No. 71 of 1958, the suit filed by

A R. Krishnammal, the widow. She would say that the properties described in Schedule-I, fell to the share of her husband in the partition and he has separate possession. The properties which were self-acquired by him were in Schedule-IA. Thereafter, she referred to the proceedings under Section 145. In paragraph-10, R.Krishnammal averred that the possession of the defendants in Schedule-I and IA is unlawful and that she is entitled to succeed on either footing and recover possession of either Schedule-I and IA properties or moiety of the properties in Schedule-I, IA and II. There is a reference to a receiver appointed during the proceedings under Section 145. In paragraph 17, it is averred *inter alia* that the cause of action arose on or about June, 1955, when defendants 1 to 4 unlawfully trespassed on the properties and on 16.04.1956, when Revenue Divisional Officer, Coimbatore upheld the possession of R.V. Lakshmiah Naidu and his sons. In the application under Order XXIII Rule 3 filed in O.S. No. 71 of 1958, it is *inter alia* stated as follows:-

> "Whereas on the death of Rangaswami Naidu on 01.06.1955, the executor could not take possession of the properties……."

172. In Gummalapura Taggina Matada Kotturuswami v. Setra Veeravva and others[74], a Bench of three learned Judges, interpreting the word 'possessed', laid down as follows:

> "11. … Of course, possession referred to in Section 14 need not be actual physical possession or personal occupation of the property by the Hindu female but may be possession in law. The possession of a licensee, lessee or a mortgagee from the female owner or the possession of a guardian or a trustee or an agent of the female owner would be her possession for the purpose of Section 14. The word "possessed" is used in Section 14 in a broad sense and in the context possession means the state of owning or having in one's hands or power. It includes possession by receipt of rents and profits". The learned Judges expressed the view that even if a trespasser were in possession of the land belonging to a female owner, it might conceivably be regarded as being in possession of the female owner, provided the trespasser had not perfected his title. We do not think that it is necessary in the present case to go to the extent to which the learned Judges went. It is sufficient to say that "possessed" in Section 14 is used in a broad

[74]AIR 1959 SC 577

sense and in the context means the state of owning or having in one's hand or power. In the case of *Gostha Behari* v. *Haridas Samanta* [AIR 1957 Cal 557, 559] P.N. Mookherjee, J. expressed his opinion as to the meaning of the words "any property possessed by a female Hindu" in the following words:

"The opening words in "property possessed by a female Hindu" obviously mean that to come within the purview of the section the property must be in possession of the female concerned at the date of the commencement of the Act. They clearly contemplate the female's possession when the Act came into force. That possession might have been either actual or constructive or in any form recognized by law, but unless the female Hindu, whose limited estate in the disputed property is claimed to have been transformed into absolute estate under this particular section, was at least in such possession, taking the word —possession" in its widest connotation, when the Act came into force, the section would not apply."

In our opinion, the view expressed above is the correct view as to how the words "any property possessed by a female Hindu" should be interpreted. …" (Emphasis supplied)

173. In Eramma (supra), this Court has made it clear that Section 14(1) of the Hindu Succession Act does not confer title on a mere trespasser. It does not confer any right on a person possessing property without any vestige of title. We have made these remarks in the context of the following set of circumstances:

Following the death of her husband on 01.06.1955, there are two streams providing right to make a claim over the property in favour of R. Krishnammal, when the Hindu Succession Act came into force. Under the Will, she was conferred with a life estate. If the Will is treated as non-existent or invalid, then, again there can be two situations. Her case would fall to be covered either under Section 3(1) or 3(2) of the Hindu Women's Right to Property Act, 1937 depending on whether the property was separate property of V. Rangaswami Naidu or an interest in the Joint Hindu Family Property. She was also having a right to be maintained.Therefore, in the facts of this case in view of the finding that the properties bequeathed under the Will and which are the plaint scheduled properties are not the separate properties of Rangaswamy Naidu, She would have the right to the properties under Section 3(2) of

A the 1937 Act. This we observe for the reason that when the Hindu Succession Act came into force, R. Krishnammal had lost her tussle under the proceedings under Section 145 of the CrPC. We have also seen the nature of the pleading which she made in O.S. No. 71 of 1958. She specifically states it that she is entitled to recover possession of the property. No doubt, she does aver that she is entitled to treat herself as
B in joint possession. We may however notice the decision in *Kotturuswami case* (supra), in fact, came to be considered by another three Judge Bench of this Court in *Mangal Singh and Others v. Smt. Rattno (Dead) by her legal representatives and another* reported in AIR 1967 SC 1786. Therein, this Court held as follows:-

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> "It was urged on behalf of the appellants that, in order to attract the provisions of S.14(1) of the Act, it must be shown that the female Hindu was either in actual physical possession, or constructive possession of the disputed property. On the other side, it was urged that even if a female Hindu be, in fact, out of
> D actual possession, the property must be held to be possessed by her, if her ownership rights in that property still exist and, in exercise of those ownership rights, she is capable of obtaining actual possession of it. It appears to us that, on the language used in S.14(1) of the Act, the latter interpretation must be accepted."

E Noticing Section 14 (1) of the Act and that it covered property possessed by a female Hindu whether acquired before or after the commencement of the Act the Court proceeded to explain the circumstances in which the decision in *Kotturuswami case* (supra) was rendered. And thereafter the Court laid down as follows:

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> "…The Court was not laying down any general principle that S.14(1) will not be attracted at all to cases where the female Hindu was not possessed of the property at the date of the commencement of the Act. In fact, there are no words used in S.14(1) which would lead to the interpretation that the property must be possessed by the female Hindu at the date of the
> G commencement of the Act. It appears to us that the relevant date on which the female Hindu should be possessed of the property in dispute, must be the date on which the question of applying the provisions of S.14(1) arises. If, on that date, when the provisions of this Section are sought to be applied, the property is possessed
> H by a female Hindu, it would be held that she is full owner of it and

not merely a limited owner. Such a question may arise in her own lifetime, or may arise subsequently when succession to her property opens on her death. The case before us falls in the second category, because Smt. Harnam Kaur was a limited owner of the property before the commencement of the Act, and the question that has arisen is whether Smt. Rattno was entitled to succeed to her rights in this disputed property on her death which took place in the year 1958 after the commencement of the Act…."

In fact, we notice that this decision was not referred to by the two Judge Bench which rendered the decision in Sadhu Singh (supra). However, we find that it has been adverted to in AIR 1996 SC 172 (see para 14) and a very recent judgment of this Court in *Shyam Narayan Sigh and Ors. vs. Rama Kant Singh and Ors.* reported in 2018(1) RCR (Civil)981 rendered again by a Bench of two learned Judges. Therein, this Court held *inter alia* as follows:

"In other words, all that has to be shown by her is that she had acquired the property and that she was 'possessed' of the property at the point of time when her title was called into question".

In view of the *dicta* in Mangal Singh (supra), we feel reassured of our view that Section 14(1) applies.

174. Incidentally, we may notice what DW1, the witness on behalf of the appellants-legatees himself says:

"..When Cr.PC 145 proceedings was conducted the properties were handed over to Latchumaiah and his sons by the receiver. From that onwards the properties are under their possession till today. We never being in the possession of the properties."

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175. The appellants claim on the basis of sale deeds executed by A. Alagiriswami, who is the First Defendant in both the Suits. The case, which is sought to be set-up is that, there was a partition among the Legatees of the plaint schedule properties and the properties purchased by them, was among the properties allotted to the First Defendant. Their entire case is based on A. Alagiriswami having rights in the property. We have already come to the conclusion that A. Alagiriswami has no rights, for the reasons which we have given. The arguments based on the compromise Decree in O.S. No. 71 of 1958, barring the Lakshmiah

A branch from questioning the partition or the Will, cannot be upheld. Insofar as we have held that R. Krishnammal had become the absolute owner under Section 14(1) of the Hindu Succession Act, and having regard to the compromise Decree in O.S. No. 71 of 1958 by which she had given-up all her rights in favour of the respondents, no right vested with A. Alagiriswami which he could have passed to the appellants. The plaintiffs
B in O.S. No. 649 of 1985, having sought a declaration of their right, and which they were entitled to. The contention that there was no challenge to the saledeeds, may not advance the case of the appellants. We have noticed what DW1,A. Alagiriswami, one of the Legatees has deposed regarding possession. In fact, as already noted, the appellants did not
C challenge the Decree of the Trial Court and they were apparently sailing along with the appellants who were the Legatees under the Will. We see, therefore, no merit in their case.

176. In regard to the other Appeals, we do not find any merit in view of our findings and the issues which fell for consideration.There is
D no merit in any of the appeals. Consequently, all the appeals will stand dismissed. There will be no order as to costs.

Divya Pandey Appeals dismissed.